

**Draft JCS Response to Welsh Government Consultation
Document – A Separate Legal Jurisdiction for Wales**

Council welcomes an opportunity to respond to this consultation paper in so doing council is mindful that policy and political considerations are not within our remit. To that end council has not considered certain questions in the paper. We would also urge caution by those considering our response from inferring any political or social opinion in respect of any of the comments made below.

1. Do you agree that a defined geographical territory would be an essential feature for a separate Welsh legal jurisdiction?

Yes

1.1 What, for the purposes of a separate Welsh legal jurisdiction, might that territory be – “Wales” as defined in the Interpretation Act 1978 or as defined in the Government of Wales Act 2006?

“Wales” as defined in the Government of Wales Act 2006 would be the preferred defined geographical territory.

2. To what extent (if any) is a distinct body of law an essential feature for a separate legal jurisdiction?

It would be essential if Wales is to be described as a jurisdiction on its' own right.

2.1 When is a body of law distinct enough in this regard?

A body of law may be distinct because of the territory over which it applies, irrespective of whether the law is different in substance from other legal jurisdictions.

2.2 Does it matter whether the law in question is statute law or common law?

Statute law may limit the applicability e.g. Welsh Language Act 1993; the Rights of Children and Young Persons (Wales) Measures 2011. The common law would be equally applicable in those jurisdictions to which it currently applies, the weight given to judgements made in other jurisdictions maybe “persuasive” rather than “binding” depending on the issue to be determined.

2.3 Does it matter what the nature of the subject-matter of the law is – e.g. criminal, civil, family?

Wales has separate legislation applicable to Children and Young Persons, and so there could be a distinction between criminal, family and civil law.

3. To what extent (if any) is the separation of responsibilities (i.e. Wales from England) for the administration of justice an essential feature of a separate legal jurisdiction?

No Comment

3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?

It is possible for a court to be cross jurisdictional and therefore the existing system could still function if both England and Wales were to become separate jurisdictions.

3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?

It is possible to apply the same laws across England and Wales even if different procedural rules are introduced. The Judiciary would apply the laws and procedures in force for the jurisdiction that they are engaged in.

3.3 If there were a separate Welsh courts system, which courts would be affected?

This would depend on the extent of separation. The existing unified court system could be returned at different levels e.g. to include High Courts, Court of Appeal and Supreme Court as now; in which case only the Magistrate, Crown and County Courts may be affected. If the levels were retained at Court of Appeal and Supreme Court, then Wales would need a separate High Court.

3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?

No See above

3.5 Should Wales continue to share some courts with England, and if so, which ones?

No comment

3.6 If Wales and England continued to share some courts, what (if any)

No comment

4. To what extent (if at all) would it be necessary for the devolved legislature to have general legislative competence over the criminal law as a separate devolved subject if responsibility for the administration of justice was devolved?

It would seem logical to give general legislative competence over the criminal law if responsibility for the administration of justice was devolved. However, as in Canada, it is possible to reserve the creation of criminal offences and defences to the UK Parliament. In so doing it would not be necessary to devolve general legislative competence.

4.1 Are there any other subjects of legislative competence that should be devolved in such a case?

No comment. This is a policy matter.

5. How might a unified England and Wales court system work if:

No comment. We regard these as policy matters.

6. When reference is made to a 'legal jurisdiction' in the sense of England and Wales being a legal jurisdiction separate from, for example, Scotland what, in its simplest form, does that mean?

In this context, a separate legal jurisdiction means more than simply a defined territorial boundary, it includes separate legal professions and distinct procedures. This reflects the situation in Scotland before the Act of Union

7. Are there any other essential features of a separate legal jurisdiction?

There are no other essential features of a separate legal jurisdiction. The current single legal jurisdiction of England and Wales is sustainable within the existing devolution settlement.

8. Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest of the UK?

We offer no comment as this is policy matter.

9. If you consider that the current legal jurisdiction is sustainable then are there any short-term or long-term changes that should be made to any of the following?

Changes in Education and training in law should include specific reference to legislation and measures applicable only to Wales, perhaps as a separate module or paper for those who wish to practice in Wales.

Access to legislation should be available on-line, albeit we accept that matters pertaining only to Wales may be on a distinct site.

10. If you consider that the current legal jurisdiction is sustainable then are there any other short-term or long-term changes that should be made?

No

**11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognised as a law in other jurisdictions within the UK?
12. Would such statute law be judicially noticed in those other jurisdictions?**

We are unable to comment

13. Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions – e.g. for enforcement or through judicial review?

We are unable to comment

14. Would such statute law be capable of being the subject of criminal proceedings in those other jurisdictions – e.g. arrest, charge, prosecution, conviction and sentencing?

We are unable to comment

15. What are the potential implications of a separate Welsh legal jurisdiction in terms of private international law (or “conflict of laws”) between Wales and the rest of the UK?

We are unable to comment

16. In the event that Wales moved towards a ‘reserved powers’ form of devolution, like Scotland’s, do you think a separate Welsh legal jurisdiction would be:

Desirable

17. Would the shared England and Wales jurisdiction be sustainable if Welsh devolution were widened?

Yes see our comment above

18. If it would be sustainable, which areas of law would need to be reserved to the UK Parliament?

We are unable to comment on policy matters

19. Would the emergence of a separate Welsh legal jurisdiction require the removal of the Assembly's power that enables it in certain circumstances to make laws applying in England?

Yes

19.1 Would there be any legal, constitutional or practical difficulty in the Assembly retaining such a power:

These raise political concerns and we are unable to comment

19.2 If you think that there would be such difficulties:

These raise political concerns and we are unable to comment

20. To what extent (if any) is the concept of a separate Welsh legal jurisdiction compatible with the unified England and Wales legal professions?

A separate legal jurisdiction would not require separate legal jurisdictions. Experience shows that many practitioners in North Wales are actually based in Chester and any more to separate the professions may reduce the numbers and experience available to meet their clients' demands.

20.1 What are the potential effects (if any) of a separate Welsh legal jurisdiction on the following aspects of the legal professions?

We leave that to others to judge.

21. Would the common law that has evolved as part of the unified jurisdiction of England and Wales be affected by the creation of a separate Welsh legal jurisdiction?

Not Necessarily

22. Would your answer be different if there was a separate court system in Wales?

Possible, matters would then be resolved under "Conflict of Laws" where there were different practice and procedural rules in force.

23. Would your answer be different if the Assembly had legislative competence generally over all (or most of) the:

No

24. Could there be express reservations excluding the common (judge-made) law from the legislative competence of the Assembly?

No Comment

25. Are there any wider economic (including resources), legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?

The geography and demographic profile of Wales has to be properly taken into account. The majority of the population lives in South Eastern Corner. There is a distinct regional identity in North West Wales, where 90% of the population speak welsh as their first language.

26. Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?

This could be available and sourced on line, provided that people were informed as to where to search on line for this information.

27. In a specifically Welsh context, are there any additional features that would be appropriate for a separate legal jurisdiction to operate effectively?

Respect for bilingualism

28. Would your answers to any of the questions in this consultation paper be different if the approach to the Assembly's legislative competence was the same as that of the Scottish Parliament – i.e. if the Assembly had competence over all matters except those expressly reserved to the UK Parliament?

No

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I think that Wales deserves to be able to make its own laws which are separate from England. This would reduce duplication of a law, one for Wales and one for England. This can be seen in the mental health act code of practice which has one for Wales and a similar one for England. Welsh law should be separate from English laws because our laws affect the people of Wales and should not be a national concern. Wales is grown up enough and mature enough to make a bold statement that devolved powers should increase the amount of Welsh laws separate from England. The Welsh people deserve a chance to have laws and policy made in Wales for the Welsh and distinct from English laws. Wales is a country in its own right and no longer an annex to England but a place where Welsh laws and Welsh policy should be focused on Wales and not have anything to do with national issues.

There is too much repetition at the moment with laws made in Westminster that affects Wales. Too many similar policies which have to be written partly for Wales and partly for England as the two countries are so different, not only in the philosophy and approach to services but also the whole make up of Wales and England are poles apart. It is time for change and the time is now.

Thanks

I have practised as a solicitor for thirty years in both England and Wales. My specialisation is administrative law, many facets of public law, and real property law. I have practised through the medium of the English and Welsh languages.

The existing legal jurisdiction of England and Wales has developed over many centuries. It incorporates legal principles and practises which originated before the Act of Union between England and Wales. Its success is one of the bedrocks of the liberties and privileges of the citizens of England and Wales. Its strengths are diverse, with the well-proven ability to cope with any change for which there is real need. Any attempt to interfere with those consequences of the jurisdiction requires the fullest scrutiny. Any attempt to alter that jurisdiction can only be justified if it is definitely clear that the jurisdiction is substantially inadequate.

The consultation document refers to the existence of the separate jurisdictions of Scotland and Northern Ireland, and appears to suggest that such circumstances could be a reason that Wales with its delegated powers of legislation could also have a separate jurisdiction. It is regrettable that the document fails to record that the existence of such jurisdictions is the result of constitutional and political factors, well rooted in history, which are very different from the background to the existing delegated legislative powers relating to Wales. Scotland also has a unique legal system, a bi-juridical system. Its criminal law is markedly different from that in England and Wales.

It is remarkable that the case for the Yes vote in the referendum held last year did not include any reference to the holding of this consultation. The issues raised in this consultation should have been highlighted in order that the electorate could have been fully informed of the ramifications of the outcome of such a vote. Democracy was ill-served by that omission.

The validity of the democratic basis of this consultation has been made further questionable when one recalls that the turnout for the referendum was only 35.63% of the electorate and the Yes vote attracted only 22.5% of the electorate. These are precarious foundations for any fundamental change in constitutional and legal matters. The seriousness of such a situation is compounded by the fact that the people of Wales were denied a referendum on the fundamental question of whether Wales needed separate primary legislation from England.

A legal jurisdiction deals with the law relating to a particular geographical area. It operates the legal system relevant to the area. For Wales there is legislation emanating from Westminster and the delegated arrangements, and other relevant sources. The system is based on the well-trodden common law with its many adaptations. Notwithstanding the delegated arrangements, the legislation related to Westminster, the many judicial interpretations and the other established sources will continue to dominate legal features of daily life in Wales. Consider these examples (by no means comprehensive) the real property law; the town and country planning law; the criminal law; inheritance law; the financial law, including taxation; commercial law; family law. Given these circumstances there is no justification for the creation of a separate legal jurisdiction for Wales.

Two hallmarks of an effective and efficient legal system are

- the quality of the legal practitioners
- the accessibility of the courts to the public

The quality of practitioners depends very much on their legal education. The existing arrangements are of the highest order. They enable legal practitioners to deal with legislation and legal matters whether they originate in

Westminster, Cardiff or Europe. These arrangements cannot be replicated in a Wales only jurisdiction. They have produced eminent lawyers from Wales who have played significant roles in the development of the laws of England and Wales with the attendant benefits to the citizens.

The existing system also enables easy access to specialisations in England which are not available in Wales. Given the much larger number of legal issues, which arise in England, and their diversity and complexity, the specialists there are more numerous, varied and, generally, more familiar with relevant matters. Such specialists again include lawyers with Welsh backgrounds. In particular the Bar of England and Wales with its base in London is an institution which is essential to the maintenance of the highest standard of legal administration and justice in Wales. I know from personal experience how such specialists have solved complex legal issues of great importance to people in Wales. I also know of many people living in Wales who use solicitors practising in England, and of people in England who use solicitors based in Wales. There is no border for such relationships.

The existing system of courts with its mixture of sittings in Wales and, in appropriate cases, access to the Royal Courts of Justice in London and the Supreme Court is effective and efficient. It constitutes one of the bulwarks of the liberty of the citizen. The Royal Courts and Supreme Court provide a depth and breadth of the highest standard of judicial intellect and expertise which a Wales only jurisdiction could not match, but to which the judge with a Welsh background can contribute.

The existing jurisdiction is a fundamental part of the union between England and Wales. The creation of a Wales only jurisdiction would be a significant breach in the union and would result in Wales having inferior arrangements. I conclude that there is no justification for such a separate jurisdiction.

Yours faithfully,

J.L.Gardner.

Response to Consultation Questions

1. Do you agree that a defined geographical territory would be an essential feature for a separate Welsh legal jurisdiction?

Yes. This is the purpose of the reform.

1.1 What, for the purposes of a separate Welsh legal jurisdiction, might that territory be – “Wales” as defined in the Interpretation Act 1978 or as defined in the Government of Wales Act 2006?

As defined by the Government of Wales Act. This is clearly a highly relevant statute in the present context and takes account of constitutional developments which have taken place since the Interpretation Act was passed. However should there be conflict between this approach and the definitions applied in the other separate legal jurisdictions of the UK, the convention in terms of the application of the definitions in those jurisdictions should be followed.

2. To what extent (if any) is a distinct body of law an essential feature for a separate legal jurisdiction?

It is not essential as the example of Northern Ireland demonstrated. However there is a growing corpus of distinct law and jurisprudence which applies within the particular context of Wales. It is part of the rationale for the present consultation.

2.1 When is a body of law distinct enough in this regard?

When practical and or legal considerations require it. However, as the consultation document itself points out, Wales already has its own devolved legislature and government. This is indicative of the political developmental context, but also will add to the growing body of distinct law which already exists.

2.2 Does it matter whether the law in question is statute law or common law?

No. The common law will continue to develop unless codified, abolished or replaced by statute of the National Assembly.

2.3 Does it matter what the nature of the subject-matter of the law is – e.g. criminal, civil, family?

It depends on the scope of the categories of law to which jurisdictional requirements would apply for example whether the criminal law should be included or continue to be a reserved matter for the UK Parliament.

3. To what extent (if any) is the separation of responsibilities (i.e. Wales from England) for the administration of justice an essential feature of a separate legal jurisdiction?

3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?

The document sets out several separate alternative patterns for court structures such as first instance courts to come within the Welsh jurisdiction whereas the appellate structure could be retained within the unified court system which exists. This would seem a rational approach, the model for which already exists within the UK.

3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?

The judiciary would not necessarily need to be separate from the unified structure but there would of necessity need to be a recognised group of judges concentrated within the Wales and Chester Circuit with the required expertise to support the jurisdiction.

3.3 If there were a separate Welsh courts system, which courts would be affected?

All courts should come within the jurisdiction although it would be possible to exclude the criminal courts if these remained as reserved matters to the UK Parliament

3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?

No – the appellate courts could remain within the unified structure (see 3.1).

3.5 Should Wales continue to share some courts with England, and if so, which ones?

The writer would have to consider this in greater detail. However thought would need to be given as to whether criminal law should be brought within the jurisdiction of the National Assembly. This would certainly impose great demands upon both the legislative time and priorities of the Assembly and the permanent executive necessary to support it. It would also have major budgetary implications for the allocation of revenue between the National Assembly and Parliament.

3.6 If Wales and England continued to share some courts, what (if any) changes might be needed in the organisation of those courts?

The model appellate structure for Scotland could be used as a template for Wales, if the appellate courts were shared as suggested above.

4. To what extent (if at all) would it be necessary for the devolved legislature to have general legislative competence over the criminal law as a separate devolved subject if responsibility for the administration of justice was devolved?

It would not, unless the criminal law ceased to be a reserved matter and this was agreed between the National Assembly and Parliament.

4.1 Are there any other subjects of legislative competence that should be devolved in such a case?

It would be highly desirable for employment law to be devolved as this would logically follow for practical economic, political and legal reasons (there is a structure already in existence which is well administered and supported in Wales).

5. How might a unified England and Wales court system work if:

5.1 There were a separate Welsh legal jurisdiction and the Assembly's legislative competence:

a. remained, as now, with the ability to expand incrementally, or

It would come under increasing pressure to split from the unified structure as the body of jurisprudence and legislation expanded which it is likely to rapidly.

b. extended over all matters except for those expressly reserved to the UK Parliament?

This would speed up the pressure to separate the court system from the remainder of the UK.

5.2 The current unified legal jurisdiction of England and Wales continued and the Assembly's legislative competence:

a remained, as now, with the ability to expand incrementally, or

b extended over all matters except for those expressly reserved to the UK Parliament?

In the case of (a) there would be no immediate change as it would carry on as at present. (b) would again increase pressure to change for practical reasons.

6. When reference is made to a 'legal jurisdiction' in the sense of England and Wales being a legal jurisdiction separate from, for example, Scotland what, in its simplest form, does that mean?

It implies the presence of the three key features referred to on page 4 of the consultation:

- a. A defined territory; with
- b. A distinct body of law; and
- c. A separate legal system – with a legislature, courts, judiciary and legal profession.

6.1 In this context does legal jurisdiction just mean the territory over which the legislature (or executive) has power to legislate?

It includes this. It is a necessary but not a sufficient condition.

7. Are there any other *essential* features of a separate legal jurisdiction?

As set out in 6 above

8. Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest of the UK?

In the writer's view no. The expansion of legislative competence following the referendum will mean a considerable increase in the volume of primary and secondary legislation. This, combined with the development of a corpus of jurisprudence will increase pressure for the recognition of a separate legal jurisdiction.

9. If you consider that the current legal jurisdiction is sustainable then are there any short-term or long-term changes that should be made to any of the following?

- a. The administration of the courts and/or tribunals systems
- b. The judiciary (including the magistracy)

- c. The legal professions (including their regulation)
- d. Education and training in law
- e. Accessibility of legislation

10. If you consider that the current legal jurisdiction is sustainable then are there any other short-term or long-term changes that should be made?

The writer does not consider that the current position is sustainable in the medium to long term.

11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognised as a law in other jurisdictions within the UK?

It would be so recognised, as the new structure would need to be created with the express agreement of the UK Parliament as the consultation document underlines. Similar mechanisms would need to be established for execution of judgments throughout the UK as already exist between Scotland and the rest of the UK.

12. Would such statute law be judicially noticed in those other jurisdictions?

See answer to 11 above.

13. Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions – e.g. for enforcement or through judicial review?

See answer to 11 above.

14. Would such statute law be capable of being the subject of criminal proceedings in those other jurisdictions – e.g. arrest, charge, prosecution, conviction and sentencing?

The kind of statutory framework described in the document (page 10 – 11) would need to be created.

15. What are the potential implications of a separate Welsh legal jurisdiction in terms of private international law (or “conflict of laws”) between Wales and the rest of the UK?

Express provision would need to be agreed and legislated for between the separate jurisdictions as set out on page 10 of the document.

- 16. In the event that Wales moved towards a ‘reserved powers’ form of devolution, like Scotland’s, do you think a separate Welsh legal jurisdiction would be:**
- a. essential;
 - b. desirable;
 - c. undesirable; or
 - d. irrelevant?

It would be essential as the volume of legislation and case-law would be likely to expand rapidly.

17. Would the shared England and Wales jurisdiction be sustainable if Welsh devolution were widened?

It is highly unlikely that it would be sustainable for the reasons set out above. The exception could be the criminal law which is largely separate from the civil jurisdiction (the term is used in the non-territorial sense in this context)

18. If it would be sustainable, which areas of law would need to be reserved to the UK Parliament?

Criminal Law (for the reasons set out above)

19. Would the emergence of a separate Welsh legal jurisdiction require the removal of the Assembly's power that enables it in certain circumstances to make laws applying in England?

This logically must follow.

19.1 Would there be any legal, constitutional or practical difficulty in the Assembly retaining such a power?

- a. upon the basis that any provision made in relation to England would extend to and from part of the law of England?
- b. Otherwise, and if so how?

19.2 If you think that there would be such difficulties:

- a. what are they?
- b. would those difficulties be any different to the current situation where the Assembly already has the power to make provision applicable in England?

Retention of the power would be incompatible with the creation of the jurisdiction for the same reasons as apply to Scotland presently. This would be fundamentally at odds with the new settlement.

20. To what extent (if any) is the concept of a separate Welsh legal jurisdiction compatible with the unified England and Wales legal professions?

The answer to this question depends on the degree of divergence of legislation and jurisprudence and the speed at which it occurs. In the writers view continuing professional development by legal practitioners and those involved in the administration of justice should be sufficient to cover the situation rather than

wholesale separation and recreation of the Law Society and Bar Professional bodies and regulators.

20.1 What are the potential effects (if any) of a separate Welsh legal jurisdiction on the following aspects of the legal professions?

- a. education and training;
- b. qualification;
- c. regulation.

Please see answer to Q20.

21. Would the common law that has evolved as part of the unified jurisdiction of England and Wales be affected by the creation of a separate Welsh legal jurisdiction?

Not immediately, as in the writer's view this would depend whether the Assembly decided to legislate in the area currently governed by the common law. In reality this would apply in exactly the same manner within a Welsh context as when Parliament has legislated in a matter of law previously governed by the common law. For example in relation to the Occupier's Liability Act 1984, which had previously been governed by the common law regarding injury to trespassers and which was unsatisfactory.

22. Would your answer be different if there was a separate court system in Wales?

Probably not, as the corpus of law referred to, and which the court would rely upon would in the writer's be based upon that which had developed under the present unified structure. Secondly, legal precedent which affects the common law is created in the higher courts and it is still probable that as Wales remains within the UK, it will still be bound by the decisions of the Supreme Court as in the case of Scotland.

23. Would your answer be different if the Assembly had legislative competence generally over:

- a. criminal law;
- b. civil law; or
- c. any other area of law?

Probably not, in the writer's view.

24. Could there need to be express reservations excluding the common (judge-made) law from the legislative competence of the Assembly?

24.1 Why would that be desirable, and how would it work in practice?

24.2 How difficult would that be?

It would surely be a severe limitation on both the competency of the Assembly and its right to legislate across the range of matters devolved. To attempt to create such an exception would, in the writer's view be at odds with the new settlement as well as time-consuming and pointless. There is a haphazard residual body of common law which should not be excluded from the scope of elected members to reform or abolish according to the democratic will.

25. Are there any wider economic (including resources), legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?

In the writer's opinion, there are a range of such implications:

- i. There will be an economic cost to reform, but this will be short-term and be likely to be offset by savings achieved in the medium to long term. There will be a cost to the legislation itself both in the National assembly and Parliament and in terms of separating the court structure. However the basis for the court structure already exists in essence within HMCS and the Wales and Chester Service. As the document points out, the High Court and Administrative Court already hold sessions within Wales. There would need to be an apportionment of the court budget which is currently held by the UK Ministry of Justice and this would need to be included within the Assembly's block-grant allocation.
- ii. There should be some savings for litigants in that matters will be dealt with more locally and the court income from case fees for actions could be retained within Wales. It should hopefully build greater confidence and within expertise both politically and professionally, regarding its ability to generate legislation.
- iii. It will enable justice to be dispensed more locally for the most part, rather than having to rely on non- Welsh Courts.

26. Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?

The number of sources of legislation poses problems even for lawyers. In the writer's view, there needs to be a much greater academic and professional resource which is readily available to both branches of the legal profession, to enable the Welsh jurisdiction to be supported. The difficulty is that some (perhaps most) lawyers do not know where to find guidance and judgments on Welsh legal matters. There is a paucity of textbooks on Welsh legislative processes and the legislation itself, despite the existence of an extremely valuable resource base in for example Cardiff and web-sites set up by law firms and other interested professionals. Available public resources for legislation such as legislation.gov.uk are frequently out of date, do not

always indicate repeals and do not adequately cater for the devolution settlement. For example if one wishes to find a text book on the law as it relates to special education in Wales, it is extremely difficult to find any publication which deals in any detail with non-UK Parliamentary legislation. The writer also finds that there is a lack of knowledge of the legislative processes of the Assembly and the output of legislation itself.

The writer therefore respectfully suggests that the Welsh Government should use its good offices to work with the Welsh Bar, the Law Society in Wales, local authorities, libraries and the Universities to support the development of such a resource.

27. In a specifically Welsh context, are there any additional features that would be appropriate for a separate legal jurisdiction to operate effectively?

The resource base referred to in answer to Q26 would need to be bilingual from the outset.

28. Would your answers to any of the questions in this consultation paper be different if the approach to the Assembly's legislative competence was the same as that of the Scottish Parliament – i.e. if the Assembly had competence over all matters except those expressly reserved to the UK Parliament?

In the writer's opinion, the fact that the current settlement means that Welsh legislation is actionable across England and Wales may well effect answers given above on legal precedent, the court structure, criminal law and the implications of possible reform.

29. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed please tell us about them.

In the writer's view, there is a developing jurisprudence under the new constitutional settlement which will necessitate the establishment of a separate Welsh legal jurisdiction. The Welsh Government is entirely sensible in examining the possible implications of this in the current consultation.

**Consultation
Response Form**

Your name: Mark Whitcutt B.A.(Hons)., M Phil., Solicitor

Organisation (if applicable): None.
This is a personal opinion, however I am a practising solicitor who has worked in the public and private sectors, and was seconded to the Welsh Government from 2008-10 working on educational legislation. I am also a local councillor and have taught law as a university and college lecturer.

email / telephone number:

[REDACTED]

Your address:

[REDACTED] Newport, South Wales,
[REDACTED]

Responses to consultations may be made public – on the internet or in a report. If you would prefer your response to be kept confidential, please tick here:

I confirm I my consent for this submission to be published in full by the Welsh Government.

Sir

For most people the law is a mystery. England and Wales has managed extremely well for centuries with one set of laws. To break that arrangement can only add to the mystery and complication. Crossing the border either way should not present Britons with any additional problems.

I am against any separation.

Peter H Bray

[REDACTED]

Consultation Response



Response to the Welsh Government consultation:

A Separate Legal Jurisdiction for Wales

June 2012

Introduction and general comments

In 2011-12, Citizens Advice Bureaux in England and Wales helped 2 million people with 6.9 million problems, including 440,248 in Wales – the largest number of inquiries in Wales concerning debt (142,641) and benefits (172,532), some of which invariably end up in Courts and Tribunals. We therefore welcome this opportunity to contribute to this debate.

We will set out our overall thoughts first and then address specifically some of the questions posed in the Consultation.

We believe that there are some general principles that should inform decision on a Welsh jurisdiction. All citizens in Wales should:

- have ready access to justice
- be able to find out what law applies in their circumstances
- be able to identify easily which elected representatives have the power to change that law
- be able to use English or Welsh in proceedings.

In a law-making Wales, citizens and organisations need to have:

- an awareness of the law: this requires that we have access to legislation; are alerted to proposals for change; are aware of cases involving that law
- an opportunity to contribute to its development, for example responding to consultations; reporting on how regulations are impacting; suggesting changes
- a sense of responsibility for, and ownership of, Welsh law, so that people are supportive of the law in general, but can call for change if necessary, or hold the law-makers to account.

Devolution of the justice system in Wales could have the potential to improve the system for end users, but subject to adequate resources to establish a new Court Service for Wales. We see evidence of high levels of dysfunction in the Welsh Courts as the system is undergoing considerable upheaval as result of the Courts and Tribunals Services merger and the Ministry of Justice's Court closures programme, alongside reforms to legal aid county court procedures which may make things even more difficult for litigants in person in the future. For example:-

A North Wales Client had a possession hearing. At the time of the hearing renovation work was being carried out at the court, so the usual court room and waiting area were out of use. Instead they allocated another court room and waiting area on the floor below. The waiting area was too small and there were no side rooms in order to discuss matters privately

In South Wales a client's local County Court did not have copies of the forms the client need to commence proceedings. The client did not have internet access and had to ask the bureau to provide the forms.

Jurisdictional issues

At present in Wales there are two parallel sets of laws:

- one which is shared with England and which is the same, or almost the same in both countries, *and*
- another which is about devolved fields and is increasingly distinct.

We consider that the legal system should reflect what people in Wales want. We regret that we do not know how that can be ascertained, especially as this is such a difficult topic. Would they think it proper that a case involving Welsh law, and which had arisen in Wales, could be decided in an English court and the participants not have the right to speak in Welsh? Admittedly it is unlikely under present arrangements that this would happen in practice, but it still seems to be quite possible in theory. This problem in itself makes a good case for change and reconsideration of current arrangements.

Scotland and Northern Ireland have separate jurisdictions within a United Kingdom. Wales is developing its own body of primary law. However, currently we see little by way of complexity and difference with Welsh legislation relating to personal finance, debt resolution, county court claims and enforcement warrants running in parallel to both England and UK wide legislation, which would require cases to be operated differently by businesses and consumers in Wales, or decided differently from English Courts.

We also recognize the important point that, under common-law systems (US, UK and Commonwealth) a separate legislature is always partnered by a separate jurisdiction. This ensures that there is a specialist judicial resource to interpret legislation and set precedents whereby case-law interacts with the legislature's law-making function. One of the most practical implications and benefits of a separate jurisdiction for Wales would be a separate judicial review or public/administrative law process, taking further the recent developments to regionalising the Administrative Court. The vast majority of judicial review cases are originated from London by London solicitors and clients. We agree that Cardiff should develop its own "hub" for judicial review proceedings. In this context, we consider that a Welsh legal jurisdiction would help extend the effectiveness of devolved legislation, even if no further substantive policy areas were devolved (such as criminal justice etc).

This consultation has potentially a great impact on England. If there is, or soon will be, a separate jurisdiction for Wales, then what does that mean for England? Since there is currently no separate legislature for England, the issue from an England perspective is perhaps even more confusing than from a Wales one.

The primary concern of the CAB service in this response is with the services to users and to justice outcomes in Wales. We do not take a position on the political pros and cons inevitably raised by the discussion of a separate jurisdiction.

Q 3. To what extent (if any) is the separation of responsibilities (i.e. Wales from England) for the administration of justice an essential feature of a separate legal jurisdiction?

It would seem sensible for the administration to be co-terminus with the jurisdiction. We note the comments of Judge David Williams¹, 'For example: the territorial jurisdiction for social security purposes is divided between Great Britain and Northern Ireland. This reflects the existence of two jurisdictions in the legislative sense as Northern Ireland has separate social security legislation. The territorial jurisdiction for war pensions is divided between England and Wales, Scotland, and Northern Ireland but the laws applied are the same for all four countries. The appellate jurisdiction over mental health issues is divided separately between all four countries in the United Kingdom; this is of course a devolved function, so the laws applied in each of the four countries are that country's laws. But if appeals go to the UT (Upper Tribunal) then in every case they go to the one Chamber operating a single set of procedural rules with a single judiciary. At the same time the UT will base its decision on the substantive legislation operating in the relevant country and on the procedure rules of the tribunal below.'

In practice this seems to work well. This suggests that maybe it is not essential to have separate administrations for separate jurisdictions. However, though it may not be essential, it might be highly desirable. We think that there is a clear need:

- for some cases to be heard in Wales (see below)
- for all cases concerning Welsh law to be heard in courts which have facilities for the Welsh language (see page 5)
- to encourage greater use of judicial review in Wales (see above).

Currently Administrative Court cases can be commenced in Cardiff and heard there. There is however only an 'expectation' of where case will be heard. Various factors should be taken into 'consideration' when deciding on a venue. We think there should be some cases which **must** be heard in Wales.

Example

If someone resident in Wales was near to death and their relatives were told that their organs would be used as they had not 'opted out', a possible challenge to the proposed procedure could (it appears from the relevant consultation document) be mounted on the basis of a claim that the person lacked mental capacity and therefore was exempt from the 'opt-out' provisions. The challenge (presumably by judicial review) could under current rules be made in England or Wales.

At present, as we understand it, it is likely that the hearing would be in Wales, but that would not be mandatory. If it was heard in England, it

¹ Inquiry into the establishment of a separate Welsh jurisdiction Consultation responses, at CLA WJ 12 <http://www.senedd.assemblywales.org/documents/s5908/WJ%20-%20Responses%20Pack.pdf>

might attract little attention in Wales. If it was heard in Wales, it would be more likely to come the attention of the public in Wales, who are more likely to be affected by the 'opt-out' rules and, who elect the representatives who could potentially change the rules.

Questions 11-15: Further jurisdictional implications

Q 11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognised as a law in other jurisdictions within the UK?

Q 12. Would such statute law be judicially noticed in those other jurisdictions?

Q 13. Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions – e.g. for enforcement or through judicial review?

Q 14. Would such statute law be capable of being the subject of criminal proceedings in those other jurisdictions – e.g. arrest, charge, prosecution, conviction and sentencing?

Q 15. What are the potential implications of a separate Welsh legal jurisdiction in terms of private international law (or "conflict of laws") between Wales and the rest of the UK?

We note that these issues already apply and exist in relation to the other jurisdictions in the UK. Professor Gerry Maher QC has said², 'I should add that the solution to these issues is not difficult and is really a question of adapting existing rules which apply to the current country of 'England and Wales'.

Question 25. Are there any wider economic (including resources), legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?

We would re-iterate our general point about the ability to choose to use English or Welsh in proceedings. Professor Thomas Glyn Watkin³ has pointed out that, 'The right to use Welsh before the courts is limited to the territory of Wales.' He went on to say, 'If this territorial distinction regarding the linguistic rights of litigants were formally recognized as a rule determining the courts' own territorial competence – so that cases arising in Wales or relating to Wales could only be tried by courts in Wales– it would prevent persons losing that linguistic right for reasons of administrative convenience.'

² Inquiry into the establishment of a separate Welsh jurisdiction Consultation responses, at CLA WJ 10 <http://www.senedd.assemblywales.org/documents/s5908/WJ%20-%20Responses%20Pack.pdf>

³ Inquiry into the establishment of a separate Welsh jurisdiction Consultation responses, at CLA WJ 16 <http://www.senedd.assemblywales.org/documents/s5908/WJ%20-%20Responses%20Pack.pdf>

The right to use Welsh is currently dependant on where proceedings are commenced or held. This could be regarded as unfair to someone who, lives in Wales, but is involved in court proceedings in England. Admittedly the same would apply to court proceedings in any country other than Wales, but, if there is a single jurisdiction in England and Wales surely a right that applies in one part of that jurisdiction should apply throughout it? For example:

County Court proceedings have been commenced in England against a defendant in Wales. If the claimant is elderly and would find travelling to a court in Wales difficult they might ask for a hearing in England. This would prevent the defendant having the right to use Welsh in court

Welsh law is enacted bilingually. As Professor Thomas Glyn Watkin⁴ also said 'the Welsh and English versions of such bilingual legislation are by statute to be treated as of equal standing for all purposes. They are therefore to be of equal standing when it comes to applying their provisions, including any interpretation of those provisions which their application may require.'

We consider that cases that might involve interpretation of Welsh Law should be considered in courts that have access to translation facilities.

Question 26. Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?

We agree with the Law Society call for "a single database for all legislation applicable for Wales to be compiled and maintained as a public service"⁵

It would be very helpful if consolidated legislation could be made freely available. There are a number of ways in which the process of legislating could facilitate access to consolidated legislation.

Some options are:

1. Legislation being enacted in a consolidated form. This has become a much more realistic option with the use of specialist software packages.
2. The use of 'Keeling schedules'⁶, A keeling schedule is a document that shows the significant amendments to previous legislation. It contains

⁴ Ibid

⁵ Inquiry into the establishment of a separate Welsh jurisdiction Consultation responses, at CLA WJ 21 <http://www.senedd.assemblywales.org/documents/s5908/WJ%20-%20Responses%20Pack.pdf>

⁶ For more information see : <http://www.dca.gov.uk/legist/keeling.htm>

the provisions of the earlier legislation and shows the effect of the amendments in the subsequent amending legislation.

3. Including the amended legislation in the Explanatory Notes attached to the new legislation.
4. Producing the amended legislation in an informal document.

CONSULTATION DOCUMENT: “A SEPARATE LEGAL JURISDICTION FOR WALES”

RESPONSE BY LAND REGISTRY

Summary

The purpose of this response is to draw attention to the likely implications for the functioning of the Land Registry if a separate legal jurisdiction were established for Wales. As such it can be regarded as an extended answer to consultation questions 25 and 29. It seems likely that any legislation to establish a separate jurisdiction for Wales would need to make specific provision for Land Registry functions, and we would wish to be involved in any discussions about that at an early stage.

Jurisdiction and courts

As a preliminary point, we need to give a partial answer to questions 3 and 6. Our understanding of “jurisdiction” is that it relates in part to the authority of courts. The courts of one jurisdiction do not automatically have authority in another jurisdiction, unless special provision is made. This is particularly important in relation to immoveable property such as land. It is a generally recognised principle of private international law that only the courts with authority in the place where the land is situated are able to make orders *in rem* relating to the land. Thus, the courts of England and Wales cannot make orders declaring the ownership of land in Scotland, and the courts of Scotland cannot make such orders in relation to land in England and Wales. The Supreme Court, in this sense, can be seen as a court of both jurisdictions. If there were separate High Courts for England and for Wales then, absent special provision, each would have authority only over land in its own territory. This has serious implications for the operation of land registration, as discussed below. If there were a unified High Court for the two jurisdictions, the implications would be less serious, though the detail of the arrangement would be important, and thought would have to be given to it.

Background

Her Majesty’s Land Registry (“Land Registry”) is an executive agency of Government currently attached to the Department of Business, Information and Skills. It was established by the Land Registry Act 1862 and operates under the Land Registration Act 2002. It is headed by a Chief Land Registrar, in whose name registrations are carried out by Land Registry staff under delegated authority. It is responsible for keeping the register of title to land in England and Wales (and the associated register of cautions against first registration). It is also responsible for keeping two smaller registers, the Land Charges Register and the Agricultural Credits Register, which are described below. Both of these smaller registers also cover England and Wales.

Scotland and Northern Ireland have their own land registries (Registers of Scotland and Land and Property Services of Northern Ireland), reflecting the fact that both have always been separate jurisdictions from England and Wales, and have their own

different land laws. Both are the responsibility of the devolved administrations, but their history predates not only devolution, but the Union: registration of deeds in Scotland dates back to 1617 and in Ireland to 1707. The registry in Belfast was separated from that in Dublin in 1922 (or thereabouts); although conditions then were very different from now, both politically and in the nature of the records kept, it might be instructive to investigate what issues arose in that case.

The Register of Title

Land Registry's chief function is to maintain the register of title to land in England and Wales. It contains over 23 million individual titles, covering about 75% of the land area of England and Wales – some titles still remain unregistered. Approximately 1.35 million of the registered titles are in Wales.

Registration is more than just a passive process of collecting data. It creates legal rights – some interests in land do not take effect in law until they are registered – and regulates the priority of certain interests as between themselves. The accuracy of the register is guaranteed by the state, in the sense that indemnity is payable by Land Registry to any person who suffers loss because of an error in the register, or in official copies and searches issued by Land Registry, on terms laid down in the Land Registration Act 2002. The security that this gives to property rights is an important support to the property market and so to the wider economy.

Because registration affects legal interests, disputes arise from time to time which need to be dealt with judicially, if they cannot be resolved by agreement. Disputes may be principally of two kinds:

- (a) Disputes between two or more parties (other than the registrar) in relation to an application for registration. Under section 73 Land Registration Act 2002, such disputes, if they cannot be resolved by agreement, must be referred to a judicial officer established by the Act, called the Adjudicator to HM Land Registry¹. Appeal lies from the Adjudicator's decision to the High Court.
- (b) Disputes between the applicant and the registrar. Most of these are resolved without proceedings, but, if not, the remedy is judicial review of the Registrar's decision by the High Court.

How Land Registry is currently organised

Land Registry has 14 local offices, of which 13 are in England and one in Wales, at Swansea. There is a Head Office in Croydon (though some Head Office functions are carried out in other offices) and a substantial IT section in Plymouth. The register is

¹ It is proposed that the Adjudicator will transfer into the Property Chamber in the First-tier Tribunal in 2013. Appeals would be to the Upper Tribunal. The Tribunal Procedure Committee is conducting a consultation exercise to seek views on the proposed rules for the new Property Chamber in the First-tier Tribunal:

<http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee/ts-committee-open-consultations>

computerised, and is held in a data centre in Plymouth, backed up on two further data centres, both at sites in England. The process of updating the register is also computerised; the local offices, including that in Swansea, are networked to each other and to Plymouth. There are two telephone call centres, one in Durham and the other in Swansea; that in Swansea is bilingual in English and Welsh.

Four hundred and seven staff (full time equivalent) are currently employed in Swansea.

Applications to Land Registry are, broadly, of two kinds:

- substantive applications, seeking a change to the contents of the register (for example, registration of a transfer or a mortgage)
- preliminary applications, seeking information about the register (for example, applications for an official copy or for a search).

Applications of both kinds can be made by post or in person. Most preliminary applications, and some substantive applications, can also be made online by registered users of our “Portal” or “Business Gateway” systems (most of whom are solicitors or other conveyancers, or bodies such as banks and local authorities). Applications for copies of individual registers and their associated plans can be made by the public on our website. Some preliminary applications can also be made by fax or telephone.

Most preliminary applications are made online, and are processed automatically in Plymouth. Where substantive applications are made online, they are received in Plymouth, but most are then viewed and processed by staff in the appropriate local office.

A series of “Proper Office Orders” (currently the Land Registration (Proper Office) Order 2010 (SI 2010/1635), as amended) has specified from time to time to which local office personal, postal or fax applications should be made. The choice is either to the office specified in the Order as the “proper office” for a particular geographical area, or to an office agreed in writing between the registrar and the applicant or the applicant’s conveyancer. The Wales Office at Swansea is (and has been for many years) specified as the Proper Office not only for the whole of Wales, but also for a large part of London (currently 12 London Boroughs plus the City).

Historically nearly all applications were sent to the “geographical” Proper Office (so the Wales Office processed nearly all applications relating to land in Wales). But since 2011, most have been processed by “customer teams” in accordance with written agreements between the registrar and regular applicants. Under this system each regular applicant (e.g. Solicitors’ firm, bank, local authority, developer) is allocated to a particular customer team in one of the 14 local Land Registry Offices. That team then processes all of that customer’s applications wherever the land concerned is situated.

While most solicitors based in Wales have been allocated to a customer team in the Wales Office, that is not invariably the case, and Welsh properties may, of course, be dealt with by solicitors in England (particularly in towns close to the border, whose

economic catchment area may straddle it). For the same reason, customers based in Wales may deal with properties in England.

This makes it very difficult to say what numbers of staff in the Wales Office, or Land Registry as a whole, are currently engaged in work relating to properties in Wales. But figures from 2009, when we had two separate offices in Swansea, the “Wales Office” dealing with Welsh work and the “Swansea Office” dealing with London work, and before customer teams were introduced, suggest that, if all Welsh work were now done in Swansea, it would occupy approximately two thirds of the current staff there.

Effect of a separate jurisdiction on Land Registry

While there are no doubt several detailed permutations, in the event that a separate Welsh jurisdiction is established, the broad choice would seem to be —

- a separate Land Registry for Wales, or
- the continuation of a unified Land Registry of England and Wales, operating in both jurisdictions.

As explained above, the Land Registry Wales Office in Swansea is currently completely integrated with the offices in England as a single organisation, many of whose functions are centralised. Hiving it off as a separate organisation would not be a trivial task. We have not attempted a detailed analysis or costings, but the issues include the following—

- if the creation of a separate Welsh Land Registry resulted in the repatriation of English titles to England, and Welsh titles to Wales, it might also require some adjustment of overall staffing levels
- back office functions (eg HR, Finance, operational direction, legal and mapping practice instructions) are currently provided centrally for Land Registry as a whole
- the IT infrastructure is provided centrally in Plymouth. This is not just a question of hardware. Significant numbers of staff in Plymouth are employed in maintaining and updating bespoke software to support Land Registry’s day to day operations. Many applications made electronically are processed automatically there. Setting up a separate IT infrastructure for Wales, if it became necessary, would be a major and expensive project. Sharing an IT infrastructure between two otherwise independent organisations would be likely to add a layer of bureaucracy to the process of agreeing changes.
- Land Registry as a whole is funded primarily by the fees paid by applicants for registration. There may be a risk that an entirely separate Land Registry for Wales could not be funded on that basis without an increase in fees.

A more general problem arises on the border. There is a significant number of registered (and probably also some unregistered) titles that straddle the border. A

famous example of such a property is the pub in Llanymynech, in Powys and Shropshire, which is reputed to have had a bar in each county in the days of Sunday closing in Wales. Such titles would need to be split between registries, causing some inconvenience and expense. More generally, some thought would need to be given to the effect of a separate jurisdiction on businesses in towns close to the border (on either side), with an economic catchment in each country.

On the other hand, maintaining the status quo of a single land registry, but operating in two legal jurisdictions, also presents difficulties, particularly if there were separate High Courts.

The question of how the courts of two jurisdictions would supervise a joint land registry, assuming that there were separate High Courts and, if the Adjudicator becomes part of the First-tier Tribunal, that Tribunal. If, in the name of a single Chief Land Registrar, an officer in Swansea made a decision regarding land in England, or an officer in Plymouth made a decision regarding land in Wales, which court would have power to review it? Which court would have jurisdiction if a solicitor in London, acting for an English company, made an electronic application relating to land in Wales, which was processed automatically by computer in Plymouth? In each case the answer may be that the action is to be treated as that of the Chief Land Registrar in relation to Wales. However, specific legislative provision might be the best way to resolve such questions, but thought would have to be given to it.

Land Charges and Agricultural Credits

These two smaller statutory registers are operated by Land Registry, under the Land Charges Act 1972 and the Agricultural Credits Act 1928 respectively. They are registers covering the whole of England and Wales. They are operated by a small team of staff in the Land Registry Plymouth Office, and are computerised, with their own bespoke systems operating in the same data centres used for the register of title.

The Land Charges Register comprises—

- a register of certain interests affecting unregistered land (that is, titles which are not yet included in the register of title). This is organised by counties as well as names, making it easy to identify entries relating to Wales.
- registers of bankruptcy petitions and bankruptcy orders, deeds of arrangements, and other pending land actions and writs or orders affecting land. These are organised only by the names of individuals, not by county, making it impractical to identify which entries may relate to assets in Wales. In any event, the whereabouts of a bankrupt's assets will not necessarily be known at the time a petition or order is made and registered. If a separate jurisdiction is created, a decision will need to be made as to the extent to which a bankruptcy order made in one jurisdiction would have effect in the other, and the solution for these registers would seem to depend upon that.

The Agricultural Charges Register is a register of charges, similar to floating charges, created by individual farmers over their farm stock and other farming assets. It is also a register of names, and is not geographically organised, again making a split difficult.

HM Land Registry
www.landregistry.gov.uk

June 2012

Any questions or follow up concerning this response can be addressed to:

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Dr Kirsty J Hood

Response to Consultation on *A Separate Legal Jurisdiction for Wales*

I am grateful for the opportunity to respond to this Consultation. For the sake of completeness, I would simply note at the outset that (whilst I am a member of the Faculty of Advocates) the views expressed here are my own. I would now comment upon the various Questions posed in the Consultation Paper as follows:-

Q1. Do you agree that a defined geographical territory would be an essential feature for a separate Welsh legal jurisdiction?

It is difficult to see how there could be a separate Welsh legal jurisdiction, without there being something identifiable as ‘Wales’. However, I would agree entirely with the proposition in the Consultation Paper that there “*is already a reasonably ascertainable defined territory for Wales*”. I think, however, that the precise geographical definition of Wales is less important, for the existence of a separate Welsh legal jurisdiction: whilst the precise boundaries of Wales could alter over time, this would not mean that a separate Welsh legal jurisdiction would cease to exist. By way of some comparison, the Union with England Act 1707 (which preserved the Scottish legal system) did not define ‘Scotland’, although the Government of Ireland Act 1920 did define Northern Ireland (by reference to parliamentary counties and boroughs). These probably reflect their historical context, and I do think that it would, however, make sense to be clear as to the boundaries of the territory of Wales, if it is to become a separate legal jurisdiction.

1.1 What, for the purposes of a separate Welsh legal jurisdiction, might that territory be – “Wales” as defined in the Interpretation Act 1978 or as defined in the Government of Wales Act 2006?

I think that both would be workable proposals. However, one might express a preference for the definition in the Government of Wales Act 2006, so as to

avoid any uncertainty as to into which legal jurisdiction would fall the territorial waters around Wales (as opposed to the high seas).

Q2. To what extent (if any) is a distinct body of law an essential feature for a separate legal jurisdiction?

It would seem to me that a different body of law applying within the territory in question is necessary, for that territory to be a separate legal jurisdiction. I approach this from the standpoint of the private international lawyer. Private international law constitutes a recognition that the world is divided “*into independent territorial legal units, such as Ontario, Quebec, France*”¹ each governed by their own laws, and is an attempt to solve the questions which inevitably arise as a result, namely: which legal unit has jurisdiction to hear a particular case which potentially relates to a number of legal units; which of the various bodies of law should apply to a case potentially relating to a number of those units; and should a judgment pronounced by the courts of one of those legal units be recognised in the others? All of this seems to me to presuppose that each legal unit (or legal jurisdiction) has its own body of law, different in some way from other legal units. In any event, from a pragmatic viewpoint, if there was no distinction at all between the law which applied in two territories, there would seem little point in trying to delineate them as two separate legal jurisdictions.

2.1 When is a body of law distinct enough in this regard?

I think that technically any distinction of practical significance would be enough. One might look, for example, to the various states of Australia, which are Common Law systems, but each have legislatures with certain powers, thus producing a different body of law in each of the states: the Australian states are, however, accepted to be different legal jurisdictions. Northern Ireland is another example, even closer to home.

¹ Castel, *Introduction to Conflict of Laws*, Butterworths Canada, 4th edn., 2002, p. 4. See too Cheshire, North & Fawcett, *Private International Law*, Oxford University Press, 14th edn., 2008, p. 4: “*The raison d’être of private international law is the existence in the world of a number of separate municipal systems of law – a number of separate legal units – that differ greatly from each other in the rules by which they regulate the various legal relations arising in daily life*”.

2.2 Does it matter whether the law in question is statute law or common law?

No – again, one need only look to Northern Ireland, which has its own Assembly with law-making powers, but otherwise effectively proceeds upon the Common Law, and yet is a separate legal jurisdiction within the United Kingdom. Similarly, all of the Canadian provinces (with the exception of Quebec) are Common Law systems, but each with a separate legislature passing its own laws for that province (insofar as not reserved to the central government there), and are separate legal jurisdictions within Canada. As noted above, the Australian states are another example of legal jurisdictions with differing bodies of statute law, but which are all otherwise Common Law systems.

2.3 Does it matter what the nature of the subject-matter of the law is – e.g., criminal, civil, family?

Provided that there is a body of law applicable within that territory, it does not seem to me to be of critical importance that certain matters are reserved to central government, nor what those particular reserved matters are (one could compare the very different matters which fall within the power of the states in the United States, the provinces in Canada, and Scotland within the United Kingdom). However, it would not seem to me to be feasible for a legal jurisdiction actually to be set up so as to exist purely in relation to a certain area of law (rather than it simply being a matter of fact that certain matters continue to be legislated upon by central government, rather than by a legislature within that jurisdiction).

Q3. To what extent (if any) is the separation of responsibilities (i.e. Wales from England) for the administration of justice an essential feature of a separate legal jurisdiction?

It does seem to me that, realistically, responsibilities for the administration of justice would have to be largely separate, were Wales to be a separate legal jurisdiction. I will discuss this in detail in my answers to the sub-questions noted below.

3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?

I do not really think that a unified England and Wales court system would be compatible with a separate Welsh legal jurisdiction – with the exception that it does seem to me entirely possible to have a cross-jurisdictional supreme court, at the very highest tier of the court system. As the Consultation Paper notes this is already the position in the United Kingdom, with the Supreme Court operating as the highest court of appeal in Scottish civil matters, and in all matters in England and Wales, and Northern Ireland. Other examples of a cross-jurisdictional supreme court can be found in the Supreme Court of Canada,² and the High Court of Australia. As I noted above, one facet of private international law is the issue of recognition of the court judgments of one legal jurisdiction, in other legal jurisdictions: (leaving aside the possibility of a cross-jurisdictional supreme court) it would seem a little odd at lower levels to have one judge in a unified court system deciding whether the judgment of a fellow judge in that system ought to be recognised.

3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?

It is hard to imagine that a separate Welsh legal jurisdiction (and separate court system) would be compatible with a unified England and Wales judiciary. I say this for two reasons. The first is the practical point, that I think that it would be difficult for one judiciary to be subject to (and integrated into) two separate court administrations (in terms of scheduling, provision of IT support, funding, etc.). The second, broader, reason is that I think ideally one would want the judges operating within a legal jurisdiction to be those who operate largely within, and are familiar with, the body of law which prevails in that legal jurisdiction. There is, of course, the exception (if exception it truly is), of a cross-jurisdictional Supreme Court drawing from all jurisdictions of the UK. Previously, in the House of Lords sitting as a judicial body, there was always a convention as to the inclusion of Scottish judges, and a judge from Northern

² And one may note the unifying tendency of the Supreme Court of Canada, which has been said not to “tolerate divergences in the common law from province to province, or even divergences in the interpretation of similar provincial statutes” (Hogg, *Constitutional Law of Canada*, Thomson/Carswell, student edn., 2006, para 8.5(a)).

Ireland, within that body. Insofar as still applicable, this approach could be expanded to the inclusion of a Welsh judge (drawn from a separate Welsh judiciary) on the Supreme Court bench.

3.3 If there were a separate Welsh courts system, which courts would be affected?

I think that realistically one would be envisaging separate Welsh courts at first instance level, and at the first and intermediate levels of appeal, in both civil and criminal matters. The Supreme Court would continue to provide the final level of appeal for Wales, on a cross-jurisdictional basis.

3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?

Yes – for the reasons discussed above.

3.5 Should Wales continue to share some courts with England, and if so, which ones?

Yes – but only the Supreme Court (as discussed above). I think that it would be unusual for a separate legal jurisdiction to share any courts with one neighbouring territory, at a lower level than a supreme court.³

3.6 If Wales and England continued to share some courts, what (if any) changes might be needed in the organisation of those courts?

Given that the Supreme Court already operates as a cross-jurisdictional court for the separate legal jurisdictions currently in existence in the United Kingdom (i.e., England and Wales, Scotland, and Northern Ireland), I would not have thought that the division of England and Wales into two separate legal jurisdictions would pose any particular problems for the organisation of that Court. I have indicated above that the sharing of any courts at a lower level by two different legal jurisdictions would seem to me to be unusual. Expert administrators within the England and Wales court system would be

³ I think that the existence of federal courts, alongside provincial or state courts, in Canada and the United States of America, is somewhat different (see Gall, *The Canadian Legal System*, Thomson/Carswell, 5th edn., 2004, chap. 7; Hausegger, Hennigar & Riddell, *Canadian Courts: Law, Politics, and Process*, Oxford University Press, 2009, pp. 29 – 32, 65 - 66).

better placed to advise as to organisational changes which such a proposal would necessitate: however, it would seem to me that such sharing of courts would pose many organisational challenges, in terms of funding, staffing, and judicial scheduling.

Q4. To what extent (if at all) would it be necessary for the devolved legislature to have general legislative competence over the criminal law as a separate devolved subject if responsibility for the administration of justice was devolved?

Canada is an example of a jurisdiction where legislative competence for criminal law is not devolved from the centre, and it is obviously able to deal with this appropriately. On the other hand, as a matter of practicality, it may be simpler for devolution of the administration of justice to Wales to be accompanied by devolution of legislative competence over much of the criminal law. In the context of the United Kingdom, where (for example) the Scottish legal jurisdiction encompasses civil and criminal matters, it might be thought that there may be advantages in the Welsh legal jurisdiction likewise encompassing both – and, if this were so, then it may well be logical for the Welsh Assembly to have legislative competence over much of the criminal law. One might note that the devolution settlements in the UK were initially described as asymmetrical, or indeed so different as to be described as “*haphazard devolution*”,⁴ and there may be thought to be some advantage in increased uniformity/simplicity.

4.1 Are there any other subjects of legislative competence that should be devolved in such a case?

No, whilst there are, of course, other subjects that could be devolved, I cannot think of any that would require to be devolved in such an event.

Q5. How might a unified England and Wales court system work if:

5.1 There were a separate Welsh legal jurisdiction and the Assembly’s legislative competence:

⁴ Burrows, *Devolution*, Sweet & Maxwell, 2000, p. 91.

a. **remained, as now, with the ability to expand incrementally?**

It does not seem to me that the retention of a unified England and Wales court system, despite the emergence of a separate Welsh legal jurisdiction, would be very logical (see my Answer to Q3.1 above). I do think that there would be pressure upon the system, were such an approach to be adopted.

b. **extended over all matters except for those expressly reserved to the UK Parliament?**

Again, it does not seem to me that this would be a very logical approach, and I think that this would increase the pressure upon the system (see above), such that one might doubt that it could be sustainable.

5.2 **The current unified legal jurisdiction of England and Wales continued and the Assembly's legislative competence:**

a. **remained, as now, with the ability to expand incrementally?**

I think that the current position, whereby Assembly Acts become part of the law of England and Wales, but are applicable only in Wales, involves some legal subtlety (which will not be easy for a layperson to understand, as I think is conceded at p. 5 of the Consultation Paper). Dependent upon how the Assembly's legislative competence expanded in the future, I think that this could exert pressure upon the current system of a unified legal jurisdiction.

b. **extended over all matters except for those expressly reserved to the UK Parliament?**

In that event, I think that the retention of the current unified legal jurisdiction would be logically perverse, and unsustainable.

Q6. When reference is made to a ‘legal jurisdiction’ in the sense of England and Wales being a legal jurisdiction separate from, for example, Scotland what, in its simplest form, does that mean?

For me, taking the approach of the private international lawyer, I think that it means that they are two different territorial units, each having its own court system which applies a distinct body of law (see my Answer to Q2 above). For a layperson, similarly, I think that Scotland as a separate legal jurisdiction has always connoted the existence of Scottish police forces, a Scottish prosecution service, a body of Scots civil and criminal law, and a Scottish court structure – all separate from England and Wales (which has its own mirror institutions and a separate body of laws). The existence of a Scottish Parliament, making laws for Scotland (insofar as not a reserved matter), fits easily into (and reaffirms) these definitions - but the separate Scottish legal jurisdiction existed (and was understood by the layperson to exist) prior to the opening of the new Scottish Parliament. Of course, the detail as to what a person identifies as constituting a legal jurisdiction may alter from place to place: the position in respect of criminal law in Canada does not prevent the Canadian provinces being seen as separate legal jurisdictions. However, I think that the crucial elements are those outlined in the opening sentence of the Answer.

6.1 In this context does legal jurisdiction just mean the territory over which the legislature (or executive) has power to legislate?

No, it need not. I think that what is crucial for there to be a separate legal jurisdiction, is for the territory in question to have its own court structure and its own body of laws. Usually, the power to alter and modify the substance of that body of law will reside largely/partly with a legislative body in that territory (i.e., the provincial legislatures in Canada, or the state legislatures in the United States or Australia). However, it is possible (although unusual) for that power of modification of that law to reside entirely in a cross-jurisdictional central government. The paradigm example of this is that, prior to the devolution settlements, the United Kingdom comprised three separate legal jurisdictions (viz., England and Wales, Scotland, and Northern Ireland), and yet the power to alter each of these three bodies of law rested solely with the United Kingdom Parliament at Westminster, rather than in a Scottish legislature, English and Welsh legislature, or Northern Irish legislature (save,

in the latter case, for the period of time when the earlier legislature was sitting).⁵

Q7. Are there any other *essential* features of a separate legal jurisdiction?

Other than (to the extent discussed above), a reasonably definable territory, a distinct body of law applying therein, and a separate court system, no.

Q8. Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest of the UK?

No. I think that as the laws applicable in Wales diverge, this will put increasing pressure upon the existence of a single legal jurisdiction of England and Wales (even simply as a matter of logic, and intellectual analysis).⁶

Q9. If you consider that the current legal jurisdiction is sustainable then are there any short-term or long-term changes that should be made to any of the following?

Not applicable, in the light of my Answer to Q8.

Q10. If you consider that the current legal jurisdiction is sustainable then are there any other short-term or long-term changes that should be made?

Not applicable, in the light of my Answer to Q8.

Q11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognised as a law in other jurisdictions within the UK?

There are two aspects to this. Within the UK, the question of whether an Act of the UK Parliament applies to a particular part of the UK is a question of interpretation of the statute in question. The question of whether an Act emanating from a devolved legislature applies to a particular part of the UK will be a question of whether it falls within the powers of that legislature. However, separate from that, if a statute formed

⁵ Another possible example given was the District of Columbia: see Himsworth, “Devolution and the Mixed Legal System of Scotland” 2002 Jur. Rev. 115.

⁶ And see the Evidence given to the House of Commons Welsh Affairs Committee, quoted in Turpin & Tomkins, *British Government and the Constitution*, Cambridge University Press, 7th edn., 2011, pp. 252 – 253, which chimes with the point made on p. 12 of the Consultation Paper.

part of Welsh law, then in terms of private international law rules, the Courts in England, Scotland or Northern Ireland could consider whether Welsh law applied to a particular case before them, or whether (in terms of intra-UK provisions as to the recognition and enforcement of judgments) to recognise a Welsh judgment (which might be based upon such a statute) - for a little more detail, I have discussed the application of statutes within the UK in my book on private international law/conflict of laws within the UK, at paras 2.31 to 2.40.⁷

Q12. Would such statute law be judicially noticed in those other jurisdictions?

No, not automatically. As noted above (see my Answer to Q11), judges in those jurisdictions may require to consider the scope of the statute in question, but otherwise the relevant rules of private international law (as regards the various component parts of the UK) would be applied. Currently, the various UK jurisdictions would generally treat the law of another UK jurisdiction as being a matter of fact to be proven, and not a matter within judicial knowledge (see *Orr Ewing v Orr Ewing's Trs* (1884) 11 R 600 – and with the exception of the cross-jurisdictional Supreme Court, which will take judicial notice of laws of all parts of the UK). However, this may be altered by statute: the Judicature (Northern Ireland) Act 1978 provides that the law of England and Wales falls within the judicial knowledge of judges in Northern Ireland.

Q13. Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions – e.g. for enforcement or through judicial review?

Not directly, in the sense of a person being able to bring an action for payment, or a judicial review (or as in the example of the current ability to rely upon an Assembly Act in an English Court, which is given on p. 6 of the Consultation Paper). However, where appropriate in terms of the rules of private international law, it may be possible to argue that Welsh law is applicable to an issue, and it would also (for example) be possible to seek recognition in the other UK jurisdictions of a Welsh judgment based on that statute law (and, again, it must be remembered that the UK has many provisions allowing for easy recognition of court judgments between its component jurisdictions, into which Wales could be integrated).

⁷ Hood, *Conflict of Laws Within the UK*, Oxford University Press, 2007.

Q14. Would such statute law be capable of being the subject of criminal proceedings in those other jurisdictions – e.g. arrest, charge, prosecution, conviction and sentencing?

Again, as a general rule, not directly – although I would refer to the provisions described in the Consultation Paper, in respect of Scotland and Northern Ireland.

Q15. What are the potential implications of a separate Welsh legal jurisdiction in terms of private international law (or “conflict of laws”) between Wales and the rest of the UK?

The existence of a separate Welsh legal jurisdiction would also bring into being for Wales on an intra-UK level, the sort of issues that private international law exists to solve, namely: when would the Courts operating within that separate Welsh legal jurisdiction (as opposed to Courts elsewhere in the UK) be able to hear a particular case; when should the body of Welsh law be applied, as opposed to the body of law of another UK jurisdiction with which a particular case seemed to have links; and when should Welsh courts recognise and enforce judgments which emanate from other UK jurisdictions. Sometimes countries might, for intra-national (as opposed to international) conflicts of law, use other devices or special legislation, as well as the rules of private international law, to deal with these issues. I have argued before that as between the current component parts of the UK, certain conflicts can be said to be “internalized”, whether by way of legislative harmonization of substantive law in a particular area of the law, or by being dealt with by special intra-national statutory rules in the UK (e.g., intra-national rules which ease recognition, in its very broadest sense, and enforcement within the UK), whilst other intra-UK conflicts are simply dealt with by way of the application of the traditional rules of private international law.⁸ If Wales were a separate legal jurisdiction, it could simply be integrated within this.

⁸ See Hood, *Conflict of Laws Within the UK*. Oxford University Press, 2007 (in which I also discuss the impact of EU legislation, which I have left aside in the present discussion).

Q16. In the event that Wales moved towards a ‘reserved powers’ form of devolution, like Scotland’s, do you think a separate Welsh legal jurisdiction would be essential, desirable, undesirable, or irrelevant?

I think that, in that event, a separate Welsh legal jurisdiction would be desirable, and indeed might well be essential.

Q17. Would the shared England and Wales jurisdiction be sustainable if Welsh devolution were widened?

I suspect that, over time, it would come to seem increasingly unsustainable.

Q18. If it would be sustainable, which areas of law would need to be reserved to the UK Parliament?

See my Answer to Q17 above.

Q19. Would the emergence of a separate Welsh legal jurisdiction require the removal of the Assembly’s power that enables it in certain circumstances to make laws applying in England?

Yes, I think that it would. Neither the Scottish Parliament, nor the Northern Ireland Assembly, have the power to make laws which would form part of the law of England (see Scotland Act 1998, s. 29(2)(a); Northern Ireland Act 1998, s. 6(2)(a)). It seems to me (and I think that this is also acknowledged within the Consultation Paper) that the Assembly’s power to make laws applicable in England, was made possible by the existence of the unified jurisdiction of England and Wales - and thus that the removal of that unified jurisdiction would make the retention of that power untenable.

19.1 Would there be any legal, constitutional or practical difficulty in the Assembly retaining such a power:

a. upon the basis that any provision made in relation to England would extend to and form part of the law of England?

Yes. If there was a separate Welsh legal jurisdiction, with a body of Welsh law which can be developed by the Assembly, or the UK Parliament (in respect of reserved matters), the corollary of that is that there would be a separate English legal jurisdiction (legislated for by the UK Parliament, in the absence of any other legislative assembly

exercising powers for England). It is then hard to envisage how the Assembly could realistically legislate for England, and alter the body of English law. As noted above, the Assembly's current power seems to spring from the existence of a unified jurisdiction of England and Wales.

b. otherwise, and if so how?

I can't think of any other obvious mechanism by which to do this – other than that the UK Parliament could pass a measure applicable to both England and Wales.

19.2 If you think that there would be such difficulties:

a. what are they?

See my answer to Q19.1, above.

b. would those difficulties be any different to the current situation where the Assembly already has the power to make provision applicable in England?

Yes, I think that there is a subtle difference between the power of the Assembly to pass a measure which would apply to England, in the context of there being a unified England and Wales legal jurisdiction, and the suggestion of the Assembly purporting to do so where England and Wales were each separate legal jurisdictions (again, see my Answer to Q19.1, above).

Q20. To what extent (if any) is the concept of a separate Welsh legal jurisdiction compatible with the unified England and Wales legal professions?

I think that some degree of separation is inevitable, were a separate Welsh legal jurisdiction to emerge. It would be possible (within one political country) to have separate legal jurisdictions, each with their own legal regulatory body, but all subject to an over-arching national body (as I understand to be the position in Canada). However, this is not the current pattern of the UK, where the Law Society and Bar of each of the current component parts of the UK are separate. Accordingly, it does seem to me more likely than not, that the creation of a separate Welsh legal

jurisdiction would bring about the creation of a Law Society of Wales, and Welsh Bar. However, this need not be feared, I would suggest, as overly onerous in terms of administration etc.

20.1 What are the potential effects (if any) of a separate Welsh legal jurisdiction on the following aspects of the legal professions:

a. education and training?

If one accepts that the existence of a distinct body of laws (even if having a Common Law base) is an essential feature of a separate Welsh legal jurisdiction, then those that practise within that jurisdiction will require to be educated and trained appropriately in that body of law. Universities, and other relevant providers of education and training, would thus require to provide courses which met that need. However, I would imagine that the courses currently on offer within Wales already constitute an integration of the teaching of the Common Law base, and the specialities of the Welsh constitutional position and the impact of Assembly legislation. Nor would there be anything to stop English universities teaching Welsh law – I understand that for many years, the University of Dundee has offered courses in English law to their students, as well as their teaching of Scots law.

b. qualification?

Again, it does seem to me that the existence of a separate body of law logically entails that those practising within that jurisdiction, be qualified in that body of law. I think, however, that it is important to stress that (within the confines of any relevant European Union requirements) it is entirely within the powers of the regulatory body of a jurisdiction to set the bar appropriately in terms of what is necessary for a lawyer to transfer from another jurisdiction to theirs. Thus, such a body in Wales might take the view that the shared history, and continued similarities, of the law applicable in England and that applicable in Wales, was such that relatively little else would be required of an English lawyer in order to be adjudged to be appropriately qualified to practise in Wales. My understanding is that in Canada,

although one calls to the bar of a particular province, agreement has been reached as to mobility of lawyers between provinces (which allows transfer between the Common Law provinces without the need to take further qualifications, or sit further examinations).⁹ Closer to home, the Consultation Paper already notes the current ease of transfer between Northern Ireland, and England and Wales.

c. regulation?

If one had a separate body of Welsh law, in which students were educated, and in which lawyers had to be appropriately qualified in order to practise, one could argue that regulation ought also logically to be separate. Again, the current pattern within the UK, where there are separate regulatory bodies in different parts of the UK, might likely dictate that there would be a separate Welsh regulatory body, if a separate Welsh legal jurisdiction were to emerge.

Q21. Would the common law that has evolved as part of the unified jurisdiction of England and Wales be affected by the creation of a separate Welsh legal jurisdiction?

The current legislative powers of the Assembly already carry with them the possibility that there will be alteration of the detail of the common law, insofar as it applies to Wales. If Wales became a separate legal jurisdiction, there would also be the possibility that Welsh judges might develop the common law through interpretation of its tenets and previous cases. However, Wales would continue to be a Common Law jurisdiction, and a member of the family of countries and territories throughout the world that rely upon the Common Law. Thus (as already noted) Australia would be described as a Common Law country, and all of its constituent states likewise. Whilst over the years, the Australian states and central government, have passed statutes modifying there the detail of the Common Law, or followed particular interpretations as to how the Common Law should apply there to new situations, the Courts there may still look to English Common Law cases for (non-binding) guidance as to how a

⁹ See Gall, *The Canadian Legal System*, Thomson/Carswell, 5th edn., 2004, pp. 287 – 292.

similar situation has been analysed and decided in England (and, of course, vice versa).

Q22. Would your answer be different if there was a separate court system in Wales?

As explained above, I think that it is difficult to see a separate Welsh legal jurisdiction operating without a separate court system in Wales (with the exception of such a Welsh court system continuing to feed into the UK Supreme Court). However, if it were possible, no, this would not really change my answer.

Q23. Would your answer be different if the Assembly had legislative competence generally over all (or most of) the criminal law, civil law, or any other area of law not falling within (a) or (b)?

No.

Q24. Could there be express reservations excluding the common (judge-made) law from the legislative competence of the Assembly?

I think that that would be very difficult indeed. I think that it would be difficult to define precisely what was excluded from the Assembly's legislative competence, and in practice it would be difficult to ascertain whether an Assembly Act was competent or not. There will be situations where the main focus of a piece of legislation is not to alter a tenet of common law, yet what is proposed will interlock with the common law, or be dependent upon a common law bedrock – will this mean that the Assembly Act could be challenged as *ultra vires*, since it impacts in some way upon the common law? Nor is the common law static. One might also note that the Acts of Union between England and Scotland contained the provision that “*no alteration be made in Laws which concern private Right except for evident utility of the subjects within Scotland*” (understood as a reference to private law), but that this has proved of little practical use over the years.¹⁰ In any event, I think that it must also be borne in mind that the UK Parliament has over the years replaced or restated common law principles with statutes, and the Parliament will certainly wish to continue to do so in respect of England over the years to come. It might be thought odd to deny the power of the

¹⁰ See Turpin & Tomkins, *British Government and the Constitution*, Cambridge University Press, 7th edn., 2011, pp. 223 – 228; Hood, *Conflict of Laws Within the UK*, Oxford University Press, 2007, paras 2.23 to 2.24.

Assembly to put in place a Welsh solution which involves alteration of the common law, whilst accepting the power of the UK Parliament to do the same in regard to England.

24.1 Why would that be desirable, and how would it work in practice?

For the reasons given above, this does not seem to me to be particularly desirable, and nor do I think that it would be easy to operate in practice.

24.2 How difficult would that be?

It does seem to me that this would be difficult (see my Answer above).

Q25. Are there any wider economic (including resources), legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?

Many of these aspects are better commented upon by others. I would suggest, however, that the emergence of a separate Welsh legal jurisdiction, could be greatly invigorating for Welsh legal life, at all levels (university, practitioner, etc.).

Q26. Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?

Again, this may be a Question better answered by others. However, I think that many jurisdictions across the world are currently considering, or have arrived at, solutions to this issue (e.g., involving the use of new technology) – and this would provide much material for consideration in arriving at a solution suitable for Wales.

Q27. In a specifically Welsh context, are there any additional features that would be appropriate for a separate legal jurisdiction to operate effectively?

I would defer to those teaching, and practising, law in Wales, who will be best placed to advise on this.

Q28. Would your answers to any of the questions in this consultation paper be different if the approach to the Assembly’s legislative competence was the same as that of the Scottish Parliament – i.e. if the Assembly had competence over all matters except those expressly reserved to the UK Parliament?

I would only note that the wider the powers of the Assembly, and hence the greater the divergence in the laws applicable in respect of Wales, I think the greater will be the pressure upon the existence of a unified England and Wales jurisdiction – however, I think that this point is referred to at the appropriate parts of my Answers above.

In conclusion, I hope that the above Answers are of some assistance – and should be delighted to comment further, if desired.

Dr Kirsty J Hood
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[Advocate at the Scottish Bar]

18 June 2012



Y Tîm Polisi Cyfansoddiadol
Llywodraeth Cymru
4ydd Llawr
Parc Cathays 2
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CF10 3NQ

15 Mehefin 2012

Annwyl Syr/ Madam

**Sylw Comisiynydd y Gymraeg ar Ddogfen Ymgynghori Llywodraeth Cymru
'Awdurdodaeth Gyfreithiol ar Wahân ar gyfer Cymru'**

- 1.1 Mae a wnelo sylwadau Comisiynydd y Gymraeg ar y cynnig i sefydlu awdurdodaeth gyfreithiol ar wahân i Gymru â'r materion canlynol: -
- y statws swyddogol a roddir i'r iaith Gymraeg yng Nghymru ym Mesur y Gymraeg (Cymru) 2011, a goblygiadau hynny wrth sefydlu awdurdodaeth gyfreithiol ar wahân i Gymru
 - cyfreithiau Prydeinig yn trin y Gymraeg yn llai ffafriol ac yn rhwystro defnyddio'r Gymraeg gan bersonau yng Nghymru, a'r ystyriaeth y dylid ei rhoi i unrhyw gyfleoedd sy'n codi i fynd i'r afael â hynny pe sefydlid awdurdodaeth gyfreithiol ar wahân i Gymru
 - diffyg statws cyfartal i fersiwn Gymraeg deddfau Prydeinig. e.e. Deddf yr Iaith Gymraeg 1993, a'r ystyriaeth y dylid ei rhoi i unrhyw gyfleoedd sy'n codi i fynd i'r afael â hynny pe sefydlid awdurdodaeth gyfreithiol ar wahân i Gymru
 - unrhyw gyfleoedd fyddai'n codi i hwyluso gweinyddiaeth cyfiawnder drwy gyfrwng y Gymraeg pe sefydlid awdurdodaeth gyfreithiol ar wahân i Gymru.

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Comisiynydd y
Gymraeg
Welsh Language
Commissioner

- 1.2 Mae Comisiynydd y Gymraeg (Comisiynydd) yn croesawu'r cyfle i roi sylw ar yr ymgynghoriad ar Awdurdodaeth Gyfreithiol ar Wahân ar gyfer Cymru.
- 1.3 Prif nod y Comisiynydd yw hybu a hwyluso defnyddio'r Gymraeg. Gwneir hyn drwy ddwyn sylw at y ffaith bod statws swyddogol i'r Gymraeg yng Nghymru a thrwy osod safonau ar sefydliadau. Bydd hyn, yn ei dro, yn arwain at sefydlu hawliau i siaradwyr Cymraeg.
- 1.4 Mae dwy egwyddor yn sail i waith y Comisiynydd:
 - Ni ddylid trin y Gymraeg yn llai ffafriol na'r Saesneg yng Nghymru
 - Dylai personau yng Nghymru allu byw eu bywydau drwy gyfrwng y Gymraeg os ydynt yn dymuno gwneud hynny.
- 1.5 Crëwyd swydd y Comisiynydd gan Fesur y Gymraeg (Cymru) 2011. Caiff y Comisiynydd ymchwilio i fethiant i weithredu cynllun iaith; ymyrraeth â'r rhyddid i ddefnyddio'r Gymraeg yng Nghymru ac, yn y dyfodol, i gwynion ynghylch methiant sefydliadau i gydymffurfio â safonau.
- 1.6 Un o flaenoriaethau'r Comisiynydd yw craffu ar ddatblygiadau polisi o ran y Gymraeg, gan weithredu fel eiriolwr annibynnol ar ran siaradwyr Cymraeg yng Nghymru. Yn unol â'r swyddogaeth honno darperir sylwadau mewn ymateb i ymgynghoriadau. Yn arferol ni ymatebir yn ffurfiol i ymgynghoriadau er mwyn osgoi unrhyw gyfaddawd posibl ar swyddogaethau'r Comisiynydd ym maes rheoleiddio.
- 1.7 Mae Llywodraeth y DU wedi cadarnhau Siarter Ewropeaidd ar gyfer leithoedd Rhanbarthol neu Leiafrifol. Roedd adroddiad¹ y Cyngor Ewropeaidd ar weithrediad y Siarter yn 2003 yn canmol sut oedd dewis iaith yn cael ei hyrwyddo yn y llysoedd yng Nghymru. Noda'r adroddiad yn ogystal fod y Pwyllgor o Arbenigwyr yn ffyddiog o weld cynnydd yn y defnydd o'r Gymraeg mewn achosion llys. Mae'r Comisiynydd am weld parhad yn y gwelliant o ran y dewis iaith a gynigir. Cynigiwn y dylai Llywodraeth Cymru, fel rhan o'r ymgynghoriad hwn, fynd ati i ystyried i ba raddau y byddai sefydlu awdurdodaeth gyfreithiol ar wahân yn cynnig cyfle i wella'r ddarpariaeth Gymraeg ymhellach wrth weinyddu cyfiawnder yn y llysoedd.
- 1.8 Rhoddir ym Mesur y Gymraeg (Cymru) 2011 statws swyddogol i'r iaith Gymraeg yng Nghymru. Felly, wrth ystyried sefydlu awdurdodaeth gyfreithiol ar wahân i Gymru, un o'r materion i'w hystyried yw gallu'r awdurdodaeth gyfreithiol i weithredu'n unol â'r statws hwnnw. Cynigiwn y dylai Llywodraeth Cymru ystyried, wrth gynnal yr ymgynghoriad hwn, i ba raddau y mae'r awdurdodaeth gyfreithiol bresennol yn gweithredu'n unol â statws y Gymraeg yng Nghymru, ac i ba raddau y gallasai awdurdodaeth gyfreithiol ar wahân i Gymru weithredu felly.

¹ http://www.coe.int/t/dg4/education/minlang/Report/EvaluationReports/UKECRML1_en.pdf
(pwyntiau 135 – 143)



Comisiynydd y
Gymraeg
Welsh Language
Commissioner

- 1.9 Nodir ym mhwynt 1.4 uchod yr egwyddorion sy'n sail i waith y Comisiynydd. Mae rhai cyfreithiau Prydeinig yn trin y Gymraeg yn llai ffafriol ac yn rhwystro defnyddio'r Gymraeg gan bersonau yng Nghymru. Mae enghreifftiau o gyfreithiau o'r fath yn cynnwys y gyfraith cofrestru priodasau, sy'n caniatáu tystysgrifau priodas uniaith Saesneg ond nid uniaith Gymraeg; rheoliadau amlosgi sy'n caniatáu cyflwyno ffurflenni amlosgi Saesneg ond nid rhai Cymraeg; cyfraith cofrestru genedigaeth sy'n caniatáu tystysgrifau Saesneg ond nid rhai Cymraeg. Cynigiwn y dylai Llywodraeth Cymru, wrth gynnal yr ymgynghoriad hwn, ystyried a fyddai sicrhau awdurdodaeth gyfreithiol ar wahân i Gymru yn cynnig cyfle i sicrhau bod cyfreithiau Prydeinig yn hwyluso defnyddio'r Gymraeg gan berson yng Nghymru, yn hytrach na rhwystro hynny.
- 1.10 Mater arall cysylltiedig yw nad oes statws cyfartal i fersiwn Gymraeg o ddeddfau Prydeinig. e.e. Deddf yr Iaith Gymraeg 1993. Llunnir deddfau Llywodraeth Cymru e.e. Mesur y Gymraeg (Cymru) 2011 yn y Gymraeg a'r Saesneg a rhoddir statws cyfartal i'r ddwy iaith. Mae sicrhau fod geiriad deddfau Cymru ar gael yn y ddwy iaith yn gosod arwydd clir nad yw'r Gymraeg yn cael ei drin yn llai ffafriol na'r Saesneg yng Nghymru. Cynigiwn y dylai Llywodraeth Cymru ystyried, wrth gynnal yr ymgynghoriad hwn, a fyddai sefydlu awdurdodaeth gyfreithiol ar wahân i Gymru yn cynnig cyfle i sicrhau argaeledd deddfau Prydeinig sy'n effeithio ar Gymru yn y Gymraeg a'r Saesneg.
- 1.11 Tra bod trefniadau presennol mewn llysoedd yng Nghymru yn galluogi unigolion i siarad Cymraeg mewn achosion, gan gyfeithu'r cyfraniadau hynny i Saesneg ar gyfer rhywrai yn y llys nad ydynt yn deall Cymraeg, yn aml mae gallu unigolion i ddefnyddio'r Gymraeg wedi ei gyfyngu i hynny'n unig. A fyddai sicrhau awdurdodaeth gyfreithiol ar wahân i Gymru yn hwyluso gweinyddiaeth cyfiawnder drwy gyfrwng y Gymraeg? A fyddai sicrhau awdurdodaeth gyfreithiol ar wahân yn caniatáu adolygu rheoliadau'r llysoedd er mwyn medru dewis rheithgorau dwyieithog mewn achosion perthnasol?
- 1.12 Diolch am y cyfle i ddarparu sylwadau ar eich dogfen ymgynghori. Byddwn yn croesawu cyfarfod â chi i drafod ein sylwadau a'ch ymateb iddynt.

Yn gywir

Meri Huws

Comisiynydd y Gymraeg



Constitutional Policy Team
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15 June 2012

Dear Sir / Madam

Welsh Language Commissioner's Observations on the Welsh Government's Consultation Document 'A Separate Legal Jurisdiction for Wales'

1.1 The Welsh Language Commissioner's observations on the proposal to establish a separate legal jurisdiction for Wales relate to the following matters: -

- the official status given to the Welsh language in Wales in the Welsh Language (Wales) Measure 2011, and its implications in establishing a separate legal jurisdiction for Wales
- British laws that treat the Welsh language less favourably and prevent the use of Welsh by individuals in Wales, and the consideration that should be given to any opportunities arising to tackle this should a separate legal jurisdiction for Wales be established
- lack of equal status for the Welsh versions of British laws e.g. Welsh Language Act 1993, and the consideration that should be given to any opportunities to tackle this should a separate legal jurisdiction for Wales be established
- any opportunities arising to facilitate the administration of justice through the medium of Welsh should a separate legal jurisdiction for Wales be established.

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Welsh Language
Commissioner

- 1.2 The Welsh Language Commissioner (Commissioner) welcomes the opportunity to comment on the consultation on a Separate Legal Jurisdiction for Wales.
- 1.3 The Commissioner's main aim is to promote and facilitate use of the Welsh language. This is done by drawing attention to the fact that the Welsh language has official status in Wales and by enforcing standards upon organizations. This, in turn, will lead to the establishment of rights for Welsh speakers.
- 1.4 Two principles form the basis of the Commissioner's work:
 - The Welsh language should not be treated less favourably than English in Wales
 - Individuals in Wales should be able to live their lives through the medium of Welsh if they wish to do so.
- 1.5 The Commissioner's post was created by the Welsh Language (Wales) Measure 2011. The Commissioner may investigate failure to implement language schemes; interference with the freedom to use the Welsh language in Wales and, in the future, complaints regarding the failure of organizations to comply with standards.
- 1.6 One of the Commissioner's priorities is to scrutinise policy developments in terms of the Welsh language, acting as independent advocate on behalf of Welsh speakers in Wales. In accordance with that function, observations are provided in response to consultations. Normally, no formal response is made to consultations in order to avoid any possible compromise to the Commissioner's functions in terms of regulation.
- 1.7 The UK Government has ratified the European Charter for Regional or Minority Languages. The European Council's report¹ on implementation of the Charter in 2003 praised the way in which language choice was promoted in the courts in Wales. The report also notes that the Committee of Experts were confident of seeing an increase in the use of Welsh in court cases. The Commissioner wishes to see the improvement continue in terms of the language choice offered. We propose that the Welsh Government, as part of this consultation, should consider to what extent the establishment of a separate legal jurisdiction for Wales would offer an opportunity to further improve the Welsh provision in the administration of justice in the courts.
- 1.8 In the Welsh Language (Wales) Measure 2011 the Welsh language is given official status in Wales. Therefore, in considering the establishment of a separate legal jurisdiction for Wales, one of the matters to be considered is the ability of the legal jurisdiction to act in accordance with that status. We propose that the Welsh Government should consider, in conducting this consultation, to what extent the present legal jurisdiction operates in accordance with the status of the Welsh

¹ http://www.coe.int/t/dg4/education/minlang/Report/EvaluationReports/UK%20CRML1_en.pdf
(points 135 – 143)

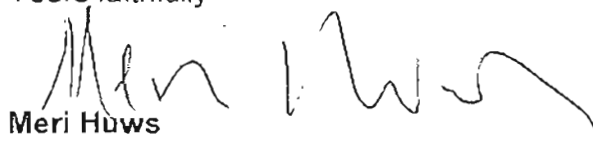


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Welsh Language
Commissioner

language in Wales, and to what extent a separate legal jurisdiction for Wales would be able to do so.

- 1.9 The principles that form the basis for the Commissioner's work are noted in point 1.4 above. Some British laws treat the Welsh language less favourably and prevent the use of Welsh by individuals in Wales. Examples of such laws include the marriage registration law which allows marriage certificates in English only but not in Welsh only; cremation regulations which allow submission of English cremation forms, but not Welsh ones; birth registration law which allows English certificates but not Welsh ones. We propose that the Welsh Government, in conducting this consultation, should consider whether securing a separate legal jurisdiction for Wales would offer an opportunity to ensure that British laws facilitate rather than prevent use of the Welsh language by individuals in Wales.
- 1.10 Another related matter is that there is no equal status for Welsh versions of British laws. e.g. The Welsh Language Act 1993. Welsh Government laws e.g. the Welsh Language (Wales) Measure 2011 are formulated in both Welsh and English and equal status is given to both languages. Ensuring that the wording of Welsh laws is available in both languages gives a clear sign that the Welsh language is not being treated less favourably than English in Wales. We propose that the Welsh Government should consider, in conducting this consultation, whether the establishment of a separate legal jurisdiction for Wales would offer an opportunity to ensure that British laws affecting Wales are available in both Welsh and English.
- 1.11 Whilst existing arrangements in courts in Wales enable individuals to speak Welsh in proceedings, and the translation of those contributions into English for those persons in court unable to understand Welsh, often the extent to which individuals can use the Welsh language is restricted to that only. Would securing a separate legal jurisdiction for Wales facilitate the administration of justice through the medium of Welsh? Would securing a separate legal jurisdiction allow a review of court regulations in order to be able to select bilingual juries in relevant cases?
- 1.12 Thank you for the opportunity to submit observations on your consultation document. I would welcome the opportunity to meet with you to discuss our comments and your response to them.

Yours faithfully



Meri Huws

Welsh Language Commissioner

The professional society for
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JCS Response to Welsh Government Consultation

Document – A Separate Legal Jurisdiction for Wales

Response of the Justices' Clerks' Society (JCS)

JCS is the professional body for the lawyers who advise magistrates in court.

Council welcomes an opportunity to respond to this consultation paper in so doing Council is mindful that policy and political considerations are not within our remit. To that end Council has not considered certain questions in the paper. We would also urge caution by those considering our response from inferring any political or social opinion in respect of any of the comments made below.

1. Do you agree that a defined geographical territory would be an essential feature for a separate Welsh legal jurisdiction?

Yes

1.1 What, for the purposes of a separate Welsh legal jurisdiction, might that territory be – “Wales” as defined in the Interpretation Act 1978 or as defined in the Government of Wales Act 2006?

“Wales” as defined in the Government of Wales Act 2006 would be the preferred defined geographical territory.

2. To what extent (if any) is a distinct body of law an essential feature for a separate legal jurisdiction?

It would be essential if Wales is to be described as a jurisdiction on its' own right.

2.1 When is a body of law distinct enough in this regard?

A body of law may be distinct because of the territory over which it applies, irrespective of whether the law is different in substance from other legal jurisdictions.

2.2 Does it matter whether the law in question is statute law or common law?

Statute law may limit the applicability e.g. Welsh Language Act 1993; the Rights of Children and Young Persons (Wales) Measures 2011.

The common law would be equally applicable in those jurisdictions to which it currently applies, the weight given to judgements made in other jurisdictions maybe "persuasive" rather than "binding" depending on the issue to be determined.

2.3 Does it matter what the nature of the subject-matter of the law is – E.g. criminal, civil, family?

Wales has separate legislation applicable to Children and Young Persons, and so there could be a distinction between criminal, family and civil law.

3. To what extent (if any) is the separation of responsibilities (i.e. Wales from England) for the administration of justice an essential feature of a separate legal jurisdiction?

No Comment

3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?

It is possible for a court to be cross jurisdictional and therefore the existing system could still function if both England and Wales were to become separate jurisdictions.

3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?

It is possible to apply the same laws across England and Wales even if different procedural rules are introduced. The Judiciary would apply the laws and procedures in force for the jurisdiction that they are engaged in.

3.3 If there were a separate Welsh courts system, which courts would be affected?

This would depend on the extent of separation. The existing unified court system could be returned at different levels e.g. to include High Courts, Court of Appeal and Supreme Court as now; in which case only the Magistrate, Crown and County Courts may be affected. If the levels were retained at Court of Appeal and Supreme Court, then Wales would need a separate High Court.

3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?

No. See above

3.5 Should Wales continue to share some courts with England, and if so, which ones?

No comment

3.6 If Wales and England continued to share some courts, what (if any)

No comment

4. To what extent (if at all) would it be necessary for the devolved legislature to have general legislative competence over the criminal law as a separate devolved subject if responsibility for the administration of justice was devolved?

It would seem logical to give general legislative competence over the criminal law if responsibility for the administration of justice was devolved. However, as in Canada, it is possible to reserve the creation of criminal offences and defences to the UK Parliament. In so doing it would not be necessary to devolve general legislative competence.

4.1 Are there any other subjects of legislative competence that should be devolved in such a case?

No comment. This is a policy matter.

5. How might a unified England and Wales court system work if:

No comment. We regard these as policy matters.

6. When reference is made to a 'legal jurisdiction' in the sense of England and Wales being a legal jurisdiction separate from, for example, Scotland what, in its simplest form, does that mean?

In this context, a separate legal jurisdiction means more than simply a defined territorial boundary, it includes separate legal professions and distinct procedures. This reflects the situation in Scotland before the Act of Union.

7. Are there any other essential features of a separate legal jurisdiction?

There are no other essential features of a separate legal jurisdiction. The current single legal jurisdiction of England and Wales is sustainable within the existing devolution settlement.

8. Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest of the UK?

We offer no comment as this is policy matter.

9. If you consider that the current legal jurisdiction is sustainable then are there any short-term or long-term changes that should be made to any of the following?

Changes in Education and Training in law should include specific reference to legislation and measures applicable only to Wales, perhaps as a separate module or paper for those who wish to practice in Wales.

Access to legislation should be available on-line, albeit we accept that matters pertaining only to Wales may be on a distinct site.

10. If you consider that the current legal jurisdiction is sustainable then are there any other short-term or long-term changes that should be made?

No

11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognised as a law in other jurisdictions within the UK?

We are unable to comment

12. Would such statute law be judicially noticed in those other jurisdictions?

We are unable to comment

13. Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions – e.g. for enforcement or through judicial review?

We are unable to comment

14. Would such statute law be capable of being the subject of criminal proceedings in those other jurisdictions – e.g. arrest, charge, prosecution, conviction and sentencing?

We are unable to comment

15. What are the potential implications of a separate Welsh legal jurisdiction in terms of private international law (or “conflict of laws”) between Wales and the rest of the UK?

We are unable to comment

16. In the event that Wales moved towards a ‘reserved powers’ form of devolution, like Scotland’s, do you think a separate Welsh legal jurisdiction would be:

Desirable

17. Would the shared England and Wales jurisdiction be sustainable if Welsh devolution were widened?

Yes see our comment above

18. If it would be sustainable, which areas of law would need to be reserved to the UK Parliament?

We are unable to comment on policy matters

19. Would the emergence of a separate Welsh legal jurisdiction require the removal of the Assembly’s power that enables it in certain circumstances to make laws applying in England?

Yes

19.1 Would there be any legal, constitutional or practical difficulty in the Assembly retaining such a power:

These raise political concerns and we are unable to comment

19.2 If you think that there would be such difficulties:

These raise political concerns and we are unable to comment

20. To what extent (if any) is the concept of a separate Welsh legal jurisdiction compatible with the unified England and Wales legal professions?

A separate legal jurisdiction would not require separate legal jurisdictions. Experience shows that many practitioners in North Wales are actually based in Chester and any more to separate the professions may reduce the numbers and experience available to meet their clients’ demands.

20.1 What are the potential effects (if any) of a separate Welsh legal jurisdiction on the following aspects of the legal professions?

We leave that to others to judge.

21. Would the common law that has evolved as part of the unified jurisdiction of England and Wales be affected by the creation of a separate Welsh legal jurisdiction?

Not Necessarily

22. Would your answer be different if there was a separate court system in Wales?

Possible, matters would then be resolved under "Conflict of Laws" where there were different practice and procedural rules in force.

23. Would your answer be different if the Assembly had legislative competence generally over all (or most of) the:

No

24. Could there be express reservations excluding the common (judge-made) law from the legislative competence of the Assembly?

No Comment

25. Are there any wider economic (including resources), legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?

The geography and demographic profile of Wales has to be properly taken into account. The majority of the population lives in South Eastern Corner. There is a distinct regional identity in North West Wales, where 90% of the population speak Welsh as their first language.

26. Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?

This could be available and sourced on line, provided that people were informed as to where to search on line for this information.

27. In a specifically Welsh context, are there any additional features that would be appropriate for a separate legal jurisdiction to operate effectively?

Respect for bilingualism

28. Would your answers to any of the questions in this consultation paper be different if the approach to the Assembly's legislative competence was the same as that of the Scottish Parliament – i.e. if the Assembly had competence over all matters except those expressly reserved to the UK Parliament?

No



Cymdeithas y Cyfreithwyr
The Law Society

**Consultation on a separate
legal jurisdiction
for Wales**
June 2012

1. The Law Society is the representative body for 150,128 solicitors in England and Wales¹. The Society represents and supports solicitors, negotiates on behalf of the profession, lobbies regulators, government and others and serves our members, the profession and public by defending the rule of law and promoting access to justice.

2. In Wales, The Law Society has a permanent office which is resourced to enable solicitors across England and Wales to reply to both law and policy consultations and to respond to current legal issues both stemming from the devolution of law-making and consequent upon a developing and distinct legal community.

3. **Overview**

4. The Law Society has responded to the recent inquiry on this subject by the Constitutional and Legislative Affairs Committee of the National Assembly for Wales. Both in our written and oral evidence we explored many of the issues raised in this consultation and how Wales might become a distinct legal jurisdiction. A copy of our evidence to the committee is attached. What could constitute a separate Welsh legal jurisdiction is fluid: there is no single complete definition of a legal jurisdiction for every situation.

5. This consultation is being undertaken ahead of the review by the Commission on Devolution in Wales ("the Silk Commission") of the "powers of the National Assembly for Wales and... modifications to the present constitutional arrangements". In the foreword it is stated that "the Welsh Government will submit written evidence to the [Silk] Commission... That evidence will in part be informed by the outcome of this consultation".

¹ Total number of solicitors on the roll as of 31 July 2011 - Law Society Annual Statistical Report

6. It is open to argument whether individual aspects of a legal jurisdiction if adopted for Wales might solve the concerns arising from our current circumstance of a single jurisdiction for England and Wales but with distinct legislatures in each country. Any change to the current arrangement raises a wide range of constitutional, administrative, judicial and access to justice issues. All of these issues require careful consideration, in the public interest which should be the guiding principle behind any proposals for change.
7. It appears that more thorough consideration has at this stage been given to the legislative and administrative arrangements that would have to be made in order to create a separate jurisdiction for Wales, than to the implications of a separate jurisdiction for users and providers of legal services in Wales or, indeed, for providers of legal education and training in Wales.
8. The section in the consultation paper on the impact of a separate jurisdiction on the legal profession is short and there is no discussion at all of the possible implications for the public, as users of legal services, of any changes which might be made. It is the impact on both the legal profession and the public of dividing the jurisdiction of England and Wales which requires careful consideration.
9. In our response to the current consultation we explore the broader impact of a separation from the current legal jurisdiction of England and Wales.

10. A global market

11. The Law Society promotes the benefits of the jurisdiction of England and Wales on a global stage. The law in England and Wales is transparent, predictable, flexible and supports the needs of modern commerce; in addition English is the language of international business. These features make England and Wales a highly attractive jurisdiction in which to resolve disputes.

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12. Legal services contribute £3.2 billion per annum to export earnings, largely driven by the popularity of the choice of the law of the jurisdiction of England and Wales in international trade and finance and of our courts and other forms of dispute resolution by international parties. In the context of a separate Welsh jurisdiction, whose future development was uncertain, would all this added value necessarily accrue to England not Wales? While these matters are under consideration, would England and Wales suffer as a law and forum of choice, if parties could not be certain how their contract would be interpreted after separation?
13. Would the legislation on the provision of legal services more generally and the opening up of new markets continue to apply to Wales? With the introduction of Alternative Business Structures ("ABS") into the legal market for England and Wales, an important consideration is whether changes to the delivery of legal services would continue to march in parallel in England & Wales if a separate jurisdiction were to be created? This is particularly so if it involved the creation of a separate profession. Would ABS, or other practices with ambitious growth plans, be as willing to invest and create jobs in Wales in that context? And would ABS, unlike individual law firms, continue to be licensed to provide services in England and Wales?
14. The creation of a separate Welsh legal jurisdiction might dilute some of these benefits and the resulting legal environment in Wales may be weakened as a consequence.
15. **The Profession - Serving our clients and the people of Wales**
16. A separate jurisdiction would raise the question of whether there needs to be a separate legal profession – a defined set of persons qualified and permitted to provide legal representation and advice within the jurisdiction, on matters of domestic law.
17. There are other jurisdictions within the British Isles, many much smaller than Wales for example the Channel Islands and the Isle of Man which have their own legal professions. A separate profession implies a process of

qualification and regulation, designed to protect the public from the risks of incompetent advice and to serve the proper administration of justice.

18. A sophisticated system of regulation of legal services in England and Wales has been established over the past few years, involving the Legal Services Board, the Legal Ombudsman and a set of Approved Regulators e.g. the Law Society through the Solicitors Regulatory Authority ("SRA"). This regulatory structure, even spread across a profession as large as the 150,000 strong solicitors' profession, represents two-thirds or more of the cost of a practising certificate. To duplicate these regulatory structures for Wales alone (even at the Approved Regulator level only) would represent a huge cost burden on Welsh lawyers (and their clients).

19. Would a separate Welsh jurisdiction create a need for a separate regulatory infrastructure in Wales for the legal profession, e.g. the equivalent of the Solicitors Regulation Authority or could practitioners in Wales remain within the current regulatory system? Regulation of legal services includes record keeping, disciplinary proceedings, supervising legal education providers and dealing with the transfer of lawyers into the jurisdiction. This is of central importance because of concerns regarding the ability of practitioners to move freely across the border between Wales and England to practise in future. Solicitors wishing to practise in England could face a double regulatory cost.

20. It might, however, be possible to adapt the existing structures that work for both England and Wales, at least in the first instance, to apply to both jurisdictions. How solicitors qualified in England and Wales would qualify to practise in the new jurisdiction is central. It would be possible, in principle, to ameliorate the potential costs of a separate profession by a variety of measures to make cross-border rights of practise and audience readily accessible and cross-qualification easy to achieve. The SRA could be empowered to regulate two solicitors' professions, of England and of Wales. All those currently qualified in England and Wales might retain that qualification indefinitely.

21. The relationship between Northern Ireland and England and Wales has been held up as an example of mutual recognition of legal qualification however a practitioner from Northern Ireland cannot automatically practise in England and Wales. The SRA requires application through its Qualified Lawyers

Transfer Scheme as for lawyers coming from any other jurisdiction. In the case of Northern Ireland academic qualifications are recognised but a period of training is often required. This situation does not provide an efficient precedent.

22. Are we yet in a position where the body of law which applies uniquely in Wales is so extensive as to justify, in the interests of protecting the public or the due administration of justice, the costs and other consequences of a separate legal profession? In future, a system of accreditation of competence in “the law applying in Wales”, may be a more proportionate measure.
23. There is, too, the impact on providers of legal education and training in Wales. Would all courses in Wales offer only Welsh legal qualifications? At present all are able to provide courses such as Qualifying Law Degrees, Graduate Diplomas in Law and the Legal Practice Course which are recognised by the SRA. Graduates can choose freely whether, having qualified in Wales, to practise in England or Wales. A separate recognition process for such courses for Wales would be hugely burdensome for the providers and a course recognised only for Wales would open far more limited opportunities to graduates.
24. In the context of a smaller legal profession, the costs of training and maintaining a separate legal profession might well be considerable. This is a particular problem as even now there are few practitioners' texts available which deal with the law that solely applies in Wales. Some publications acknowledge that there are separate laws governing subjects in Wales but don't go on to cover that law. Where such resources are not commercially viable the Welsh Government must step in to ensure that materials are available to the profession.
25. And what of the interests of the clients, the Welsh public (both individual and corporate) and those beyond Wales needing legal advice and representation in Wales and on Welsh matters. At present they can choose any solicitor or barrister of England and Wales and the more important or specialised their need is, the more valuable that freedom of choice becomes. Furthermore, that very breadth of choice helps to sustain the competitiveness of the market for legal services in Wales. Creating a separate legal profession in Wales

would have the potential to harm both choice and competition, to the detriment of clients.

26. Any impact on the numbers coming into the profession in Wales could harm access to justice for the public.

27. Further, there must be provision for an adequately funded legal aid system ensuring quality representation and access to justice for all. What funds would be available to the Welsh Government for the new Welsh legal jurisdiction?

28. The Welsh Government is undertaking a review of advice services for Wales which should take account of future developments in order to guarantee that the most vulnerable members of society receive good legal representation, where required, which is essential if they are to be able effectively to enforce and defend their rights.

29. Conclusion

30. The impact on the legal profession and the consequent impact on access to justice by the public requires careful consideration: the price of creating a separate legal profession for Wales, as an incident of a separate legal jurisdiction, would be a heavy one.

31. Whatever political and administrative decisions are made the Law Society, would hope to continue to represent all solicitors in England and Wales, in whatever kind of practice they operate. Maintaining a single profession would be in the public interest, even if a separate Welsh jurisdiction were to be created, unusual as such an arrangement might be.

Dear Sir / Madam

Consultation – A separate legal jurisdiction for Wales

Wales Council for Voluntary Action (WCVA) represents the interests of voluntary organisations, community groups and volunteers in Wales. It has over 2,400 organisations in direct membership and is in contact with many more through national and regional networks. WCVA's mission is to make Wales a better place by championing the voluntary, community and citizen action at the heart of Wales' third sector, in order to increase economic, social and environmental participation, inclusion, equality, wellbeing and sustainable activity.

WCVA circulated the consultation document to our members and networks along with a briefing paper explaining some of the key issues. While many of our members and the wider third sector have a keen and important interest in influencing and shaping legislation we are conscious that this particular matter is fairly technical and not something that the majority of organisations will take a view on. Organisations are keen to engage with legislation and it is essential that civil society can understand the developing body of Welsh law and influence it as appropriate; however the third sector in Wales is large and diverse and does not hold one united view on the issue of whether a separate legal jurisdiction for Wales would be desirable.

In providing this brief response WCVA would like to highlight the importance of engaging and informing the third sector and wider civil society about any proposed changes in order that they may understand the relevance and implications for them both as individuals and organisations. Often constitutionally complex issues can seem far removed from organisations working on the ground to support individuals and deliver services but it is important that significant changes are explained and as broad a range of people informed and engaged as possible. The third sector can provide access to a range of individuals and communities, often those who are least able to have their voices heard, and we would like to encourage the Welsh Government to work with us and the wider sector to ensure that as many citizens as possible are informed about legal and constitutional developments.

Whilst we cannot offer a view on this specific matter we are keen to ensure that the sector continues to be engaged as a key partner as Wales' constitutional and legal settlement develops.


Best Wishes, Michelle Matheron.



STEP Response to the Welsh Government consultation on Wales becoming a separate legal jurisdiction

The Society of Trust and Estate Practitioners (STEP) is the worldwide body for practitioners in the fields of trusts and estates, executorship, administration and related issues. STEP members help families secure their financial future and protect the interests of vulnerable relatives. STEP aims to promote the highest professional standards through education and training leading to widely recognised and respected professional qualifications. STEP internationally has over 17,500 members, with more than 6,500 members in the UK. Over 4,500 students worldwide are currently studying for STEP qualifications and in the UK STEP supports an extensive regional network providing training and professional development.

STEP Wales welcomes the opportunity to comment on the Welsh Government consultation on Wales becoming a separate legal jurisdiction and our responses to the direct questions asked in the consultation are as follows.

1. Do you agree that a defined geographical territory would be an essential feature for a separate Welsh legal jurisdiction?

Yes.

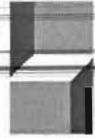
1.1 What, for the purposes of a separate Welsh legal jurisdiction, might that territory be – “Wales” as defined in the Interpretation Act 1978 or as defined in the Government of Wales Act 2006?

The 2006 Act gives a broader definition, which would be more sensible.

However, it may also be necessary to consider the basis on which a person would be regarded as domiciled in Wales (however, that is defined). Would Wales wish to retain the existing discriminatory connections through the father for legitimate children or through the mother for illegitimate children or consider a fresh approach as adopted in Scotland under the Family Law (Scotland) Act 2006? Would any form of choice or election for United Kingdom citizens to choose the part of the UK with which they regard themselves as being most closely connected, be possible or desirable? STEP is fully in favour of party autonomy and would argue that choice of domicile and/or choice of law are to be encouraged wherever possible.

2. To what extent (if any) is a distinct body of law an essential feature for a separate legal jurisdiction?

Theoretically not, but in reality, there is little point to a separate legal jurisdiction unless it does have its own distinct body of law.



2.1 When is a body of law distinct enough in this regard?

There is no absolute answer. The operation of a separate legal jurisdiction is likely to involve additional expense. At what point does the extent of the differences between English law and Welsh law, justify this additional expense? One answer would be, when the cultural differences are such as to justify it.

The website of the Supreme Court of the United Kingdom in relation to its emblem refers to “four heraldic elements, equally represented in the design, reflecting the jurisdictions within the United Kingdom

**England: a symmetrical five-petalled wild rose,
Wales: the green leaves of a leek,
Scotland: a purple thistle and
Northern Ireland: a light blue five-petalled flax flower”**

The designers clearly considered Wales to be a separate jurisdiction already, of even weight with Scotland and Northern Ireland as well as England. The extent to which the Welsh leek should be separate or entwined with the English rose would be a matter for evolution. Perhaps it is time for the leek to be growing some side shoots.

2.2 Does it matter whether the law in question is statute law or common law?

No, but it is difficult to envisage significant differences developing between English and Welsh common law until statute law begins to impose such differences.

2.3 Does it matter what the nature of the subject-matter of the law is – e.g. criminal, civil, family?

No. The division of powers between the national United Kingdom federal government and the local state Welsh or English governments is a matter for political agreement.

3. To what extent (if any) is the separation of responsibilities (i.e. Wales from England) for the administration of justice an essential feature of a separate legal jurisdiction?

Not inevitable, but it would be logical for the administration of justice to be dealt with at Welsh state level rather than UK federal level.

3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?

A separate Welsh legal jurisdiction could be compatible with a unified England and Wales court system in the same way that the Supreme Court is a unified UK court; however, some division of the court system would be sensible.

3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?

A separate Welsh legal jurisdiction could be compatible with a unified England and Wales judiciary in the same way that the Supreme Court is a unified UK court; however, some division of the judiciary would be sensible.

3.3 If there were a separate Welsh courts system, which courts would be affected?

As private client practitioners, our focus is upon property and tax issues. Our presumption would be that the High Court would be affected and inevitably therefore the county courts.

3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?

We would envisage that a separate High Court would become necessary in due course, but that the Court of Appeal could remain unified for much longer.

3.5 Should Wales continue to share some courts with England, and if so, which ones?

As private client practitioners, our knowledge of the criminal court system is limited. However, we would presume that differences between English and Welsh criminal law would be likely to remain marginal and that the criminal courts system could remain unified.

3.6 If Wales and England continued to share some courts, what (if any) changes might be needed in the organisation of those courts?

We do not feel that we can comment sensibly as to changes that might be needed.

4. To what extent (if at all) would it be necessary for the devolved legislature to have general legislative competence over the criminal law as a separate devolved subject if responsibility for the administration of justice was devolved?

We do not see that it would be necessary for the Welsh Assembly to have general legislative competence over the criminal law.

4.1 Are there any other subjects of legislative competence that should be devolved in such a case?

Succession law and other personal law issues are often seen as part of the culture of a nation state. Such subjects might well be seen as being worthy of devolution.

5. How might a unified England and Wales court system work if:

5.1 There were a separate Welsh legal jurisdiction and the Assembly's legislative competence:

- a. remained, as now, with the ability to expand incrementally, or
- b. extended over all matters except for those expressly reserved to the UK Parliament?

In either event, this would be feasible, in that the unified court system would have to apply the correct law and be competent to administer both English and Welsh laws. However, it might become increasingly difficult for courts further away from Wales, in Newcastle upon Tyne for example, to deal effectively with Welsh law issues.

5.2 The current unified legal jurisdiction of England and Wales continued and the Assembly's legislative competence:

- a. remained, as now, with the ability to expand incrementally, or
- b. extended over all matters except for those expressly reserved to the UK Parliament?

In either event, this would be feasible, in that the unified court system would have to apply the correct law and be competent to administer both English and Welsh laws. However, it might become increasingly difficult for courts further away from Wales, in Newcastle upon Tyne for example, to deal effectively with Welsh law issues.



6. When reference is made to a 'legal jurisdiction' in the sense of England and Wales being a legal jurisdiction separate from, for example, Scotland what, in its simplest form, does that mean?

The power to create and amend law in relation to a defined area and to persons connected to that area. Scottish law is a foreign law in England & Wales and subject to questions of private international law.

If Wales and England are to be separate jurisdictions, then private international law rules will need to apply between the English and Welsh jurisdictions.

6.1 In this context does legal jurisdiction just mean the territory over which the legislature (or executive) has power to legislate?

No.

Jurisdiction in relation to the Inheritance (Provision for Family and Dependents) Act 1975 currently depends upon the domicile of the deceased.

Legal jurisdiction for personal law issues depend upon a connecting factor with that individual that in England & Wales has been that of domicile. Other jurisdictions use nationality or habitual residence as the connecting factor.

Many international conventions such as the 2000 Hague International Protection of Adults Convention referred to in Sch. 3 to the Mental Capacity Act 2005, do use the connecting factor of habitual residence, instead of domicile.

If Wales is to be separate from England, then rules for determining domicile and rules for establishing habitual residence as between Wales and England would be extremely helpful.

Currently foreign law is regarded generally as a matter of fact that requires to be proved by one of the parties.

Matters of law are within the knowledge of the court.

In other jurisdictions, matters of foreign law are regarded as matters of law and the court often has resources to make its own enquiries and findings as to a particular matter of foreign law.

7. Are there any other *essential* features of a separate legal jurisdiction?

Some Constitutional mechanism for controlling disputes between the federal government and legislation and a state legislation or between state legislations is also a requirement. Whether the UK Supreme Court has sufficiently clear constitutional powers to rule in relation to matters between the UK and Wales or between Wales and England or Scotland is uncertain.

8. Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest of the UK?

Some of us believe not, but these are political matters.

To what extent is the United Kingdom necessary if its constituent parts remain as Member States of the European Union? One view is that it is only necessary in relation to those matters over which the EU has no competency. Foreign policy for the time being and taxation other than taxation within the competency of the EU. Notwithstanding, divergence in Scotland on some taxation matters, it is likely that some areas of taxation may remain uniform – inheritance tax, for example.

If so, this issue is also a matter of concern for England in addition to Wales.

9. If you consider that the current legal jurisdiction is sustainable then are there any short-term or long-term changes that should be made to any of the following?
- The administration of the courts and/or tribunals systems
 - The judiciary (including the magistracy)
 - The legal professions (including their regulation)
 - Education and training in law
 - Accessibility of legislation

10. If you consider that the current legal jurisdiction is sustainable then are there any other short-term or long-term changes that should be made?

When answering the following questions (11 to 15 (inclusive)) it would be helpful if you could provide your answers (a) firstly on the basis of a unified England and Wales court system and (b) secondly on the basis of a separate Welsh court system.

11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognised as a law in other jurisdictions within the UK?

a. Yes.

b. Yes but as a foreign law, which would currently require to be pleaded by one of the parties.

12. Would such statute law be judicially noticed in those other jurisdictions?

a. Yes.

b. Yes but as a foreign law, which would currently require to be pleaded by one of the parties.

13. Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions – e.g. for enforcement or through judicial review?

a. Yes.

b. Yes but as a foreign law. Whether it was recognised or enforceable, would depend upon the circumstances. Currently EU Regulations do not apply between constituent parts of the United Kingdom whilst Hague and other conventions generally do. Thus enforcement and recognition under Brussels I or II would not currently apply between England and Wales, in the same way that they do not apply between Scotland and England & Wales.

14. Would such statute law be capable of being the subject of criminal proceedings in those other jurisdictions – e.g. arrest, charge, prosecution, conviction and sentencing?

These matters are outside our expertise.

15. What are the potential implications of a separate Welsh legal jurisdiction in terms of private international law (or "conflict of laws") between Wales and the rest of the UK?

We have referred to private international law issues throughout our answers to these questions. We would suggest that it is time for EU Regulations to apply between the constituent parts of the United Kingdom. The UK government might perceive this as a loss

of sovereignty, but there would then be clarity, whilst at the moment there is much confusion and uncertainty.

16. In the event that Wales moved towards a 'reserved powers' form of devolution, like Scotland's, do you think a separate Welsh legal jurisdiction would be:
- a. essential;
 - b. desirable;
 - c. undesirable; or
 - d. irrelevant?

Desirable.

17. Would the shared England and Wales jurisdiction be sustainable if Welsh devolution were widened?

No.

18. If it would be sustainable, which areas of law would need to be reserved to the UK Parliament?

19. Would the emergence of a separate Welsh legal jurisdiction require the removal of the Assembly's power that enables it in certain circumstances to make laws applying in England?

Yes.

- 19.1 Would there be any legal, constitutional or practical difficulty in the Assembly retaining such a power:
- a. upon the basis that any provision made in relation to England would extend to and form part of the law of England?
 - b. otherwise, and if so how?

Yes.

- 19.2 If you think that there would be such difficulties:
- a. what are they?
 - b. would those difficulties be any different to the current situation where the Assembly already has the power to make provision applicable in England?

If power is devolved, then it is devolved to a Welsh Assembly in relation to matters pertaining to Wales and should also be devolved to an English Parliament in relation to matters pertaining to England (Even if for the time being it is called the UK Parliament). It is not appropriate for either to legislate in relation to the other.

What is required is clear private international law as to the jurisdiction, applicable law and recognition and enforcement of each other's laws.

20. To what extent (if any) is the concept of a separate Welsh legal jurisdiction compatible with the unified England and Wales legal professions?
- 20.1 What are the potential effects (if any) of a separate Welsh legal jurisdiction on the following aspects of the legal professions?
- a. education and training;
 - b. qualification;
 - c. regulation.

In due course, specialist training, qualification and regulation in Welsh law would be inevitable. Whether the profession would be of sufficient size to warrant complete separation is unclear. It is likely that Welsh specialists would be a subset of the legal profession of England and Wales.

21. Would the common law that has evolved as part of the unified jurisdiction of England and Wales be affected by the creation of a separate Welsh legal jurisdiction?

English common law and Welsh common law would inevitable begin to diverge.

22. Would your answer be different if there was a separate court system in Wales?

No.

23. Would your answer be different if the Assembly had legislative competence generally over all (or most of) the:

a criminal law;

b civil law; or

c any other area of law that you do not consider falls within (a) or (b)?

No.

24. Could there be express reservations excluding the common (judge-made) law from the legislative competence of the Assembly?

Yes, but this would be an unhelpful distinction. If, for example, succession law were to be an area of competence for the Assembly, then judges will need to interpret any legislation made by the Assembly for Wales. Welsh common law will therefore need to develop separately from English common law, whether or not this is a matter for Welsh courts and the UK Supreme Court or for a continuing court system of England & Wales.

24.1 Why would that be desirable, and how would it work in practice?

It would not be desirable.

24.2 How difficult would that be?

It would create unnecessary and unhelpful distinctions.

25. Are there any wider economic (including resources), legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?

The requirement for a separate English legal jurisdiction implies the need for a separate English parliament or assembly separate from that of the United Kingdom Parliament.

26. Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?

Websites are a very useful means of disseminating such information.

We look forward to the first text book on Welsh private international law.

27. In a specifically Welsh context, are there any additional features that would be appropriate for a separate legal jurisdiction to operate effectively?

It is presumed that there are numbers of UK citizens and domiciliaries resident in Argentina. Consideration as to matters of domicile in Wales should apply to those persons as well as to matters between England and Wales.

28. Would your answers to any of the questions in this consultation paper be different if the approach to the Assembly's legislative competence was the same as that of the Scottish Parliament – i.e. if the Assembly had competence over all matters except those expressly reserved to the UK Parliament?

No

STEP Wales and STEP Public Policy Committee
18/06/12

Ymgyrch Senedd i Gymru

Parliament for Wales Campaign

Prif Swyddfa/ Head Office

47 Ffordd Wingfield

Yr Eglwys Newydd

Caerdydd

CF14 1NJ

Sir,

We enclose below our views on a Welsh Legal Jurisdiction.

We are a cross-party organization with members from political parties and none. We reply not as an organization which works in the legal profession but as individuals who access the process of law.

International law

We contend that decisions you make must themselves conform to the law.

A Welsh Legal Jurisdiction is necessary to conform to International Law.

We refer you to the United Nations Charter Declaration regarding Non-Self-Governing Territories.

We also submit that you should conform to the UN Declaration of the Rights of Indigenous Peoples Article 5 – the right to maintain and strengthen their distinct legal institutions. We also refer you to Article 19 amongst others.

We submit that you comply with the UN International Covenant on Economic, Social and Cultural Rights commits signatories to the 'promotion of the right to self-determination'.

We refer you also with need to comply with the Framework Convention for the Protection of National Minorities, Council of Europe.

Also relevant is The Vienna Declaration on Human Rights, which refers to the denial of the rights to internal Self-Determination as a violation of Human Rights.

The European Parliament resolution on the Protection of Minorities and Anti Discriminatory Policies in

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an Enlarged Europe 'urges the Commission to establish a policy standard in order to promote in all areas of economic, social, political and cultural life effective equality between persons belonging to a national minority and those belonging to the majority. We contend that minorities within the Nations of the UK should not have widely differing powers devolved and are thus not discriminated against in this respect.

We submit that the fundamental International Law of Subsidiarity must also be applied. The Oxford dictionary defines subsidiarity as the idea that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more local level.

We refer you to the need to comply with the European Charter for Regional or Minority Languages of the Council of Europe. We contend that this compliance could be unsatisfactory or non-compliant if cases relevant to Wales are held outwith.

What is meant by the term separate Legal Jurisdiction?

The Oxford dictionary defines Jurisdiction as 'the power to make legal decisions – judgements – the territory or sphere over which the legal authority of a court or other institution extends – a system of law courts.

Our understanding is that jurisdictions can operate thematically or geographically. We refer to geographic jurisdictions from which you may take a model for Wales in particular the model in states where there is law emanating from both the State and Federal Governments, with different Jurisdictions operating for each in the same geographic area. As we understand a hybrid system is the norm in devolved states and that Wales is unique in having legislative powers without a legal jurisdiction to interpret them. We do not propose this model but only refer to it as an example of Jurisdictions existing at State level in several countries to deal with State Law. The National Assembly has both primary and secondary law making powers, as well as Ministerial powers, together with various powers of Welsh quasi-autonomous authorities, of which there are many. We would expect hearings concerning laws made in Wales, as well as those from Westminster, which deal exclusively with Wales, also to be heard in Wales, in particular cases of judicial review. There is also a considerable body of International law concerning minorities, as outlined above, and we would expect provision for cases concerning Wales only in UK law to be initially made in Wales.

The 2011 referendum conferred primary law powers on the Welsh Government in 20 devolved fields and we submit that it is implicit in the vote that a Welsh Legal Jurisdiction be set up to interpret the legislative powers the public supported and this should have been stated at the time of the referendum if it were to be otherwise.

We are not aware of State or Regional Governments which have powers to create law without there being a Legal Jurisdiction to provide certainty in its adjudication of the same law. We postulate that it is anomalous that this is now the case in Wales.

We contend that it would be perverse and could be highly controversial if a law made in Wales, in particular a Ministerial decision, could be overturned by courts which are geographically remote from

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Wales and outside the environment and understanding of our law making.

We are however content to see a final appeal to the Supreme Court with the proviso that the Welsh Judiciary may appoint a representative to it conversant in emerging Welsh Law.

The essential features of a Welsh Legal Jurisdiction we contend are:

An administrative procedure to decide on the Jurisdiction of cases.

That courts in the rest of the UK would declare forum non conveniens to cases concerning Welsh Law.

The need for a new court to consider challenges to the Laws of Wales.

The additional educational need for some of those involved in the legal profession to be conversant in Welsh Law and International Law as it applies here together with provision for those wishing to write law within the confines of the current settlement.

A prospectus statement from FE, HE and vocational Law courses on their relevance to the Curriculum Cymreig.

Bilingual Resource Libraries of Welsh Law, including the minutes of the debates during their passage of Laws the findings and evidence of Commissions and Acts devolving power and relevant International Law.

A Welsh Lord Chief Justice.

The need for Wales to be represented on the UK Supreme Court.

The consequence of having a Welsh Legal Jurisdiction would be:

That cases concerning only English law would be heard only in an English Jurisdiction. This is entirely logical and would anyone expect otherwise? The decision as to where cases are admissible may be one of administration and custom only but we contend that this should be firmed up.

That a reserved powers option for the Assembly could be considered in the future.

That a new type of court and system is required.

That a module course and module qualification in Welsh law be drawn up. We consider that the Laws of Wales, together with the ministerial explanations of them, a large number of secondary instruments, the Constitution of Wales, UK law only applicable to Wales, the repealed settlement and guidance, and International Law applicable to Wales, as sufficient to require study and to have legal experts in this field. We do not see the need for a ministerial decision before this step is taken.

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The advantages of a Welsh Legal Jurisdiction are that:

The case is heard where the relevant body of evidence and library records are held, i.e. in Wales.

That there is expeditious usage of judicial resources.

That the geographical location where the cause of action arose is that which determines the judiciary, i.e. Wales

That vexatious reasons for challenging Welsh Law or ministerial decisions or Welsh Quangos in remote locations outwith the reach of the law are avoided.

That challenges to Welsh Law are geographically accessible to the least able common man or woman. We have knowledge of cases where Welsh people have not proceeded to assert their rights in courts in London due to expense and geographical remoteness.

That a Welsh Legal Jurisdiction will best conform with the Welsh Language Acts 1993, 2011, and the European Charter for Minority or Lesser Used languages of the Council of Europe in providing language rights and translation facilities where required.

A new court type or building could create employment.

A Welsh legal Jurisdiction would best comply with the principles of Good Governance.

The establishment of a Welsh Legal Jurisdiction would best comply with Good Administration.

The establishment of a Welsh legal Jurisdiction complies with Good Practice in other countries.

Additional questions

In reply to your more detailed questions, – we suggest that these are best answered by members of the legal profession. However-

We would expect cases concerning laws made within Wales, including those concerning coastal areas and border areas, to be held in Wales – it is geographically convenient. You may need administrative or court decision making process to decide under which jurisdiction cases are held.

We do not see it necessary for a large body of law to have built up before a Welsh Jurisdiction comes about. The number of controversial cases to prove the necessity is only one.

We would expect that laws devolved to the devolved Nations including the Crown dependencies of the Isle of Man, Guernsey and Jersey are similar.

We consider the devolution of the prison service and sentencing policy as a priority including the right for prisoners of minor offences and women to serve their sentences in Wales as well as language rights for prisoners.

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We consider any administrative devolution of the courts or types of court or other aspects of the criminal justice system to be advantageous in any additional employment that may be created in a time of impending recession.

We conclude by referring the common man or woman who may wish to challenge Welsh Law or Ministerial decision – they would expect the case to be held in where it is geographically convenient in Wales, that a body of solicitors, clerks and judges had a good competency on Welsh Law and that a final appeal to the Supreme Court also had a judge with such knowledge. If there is not competency to act there cannot be certainty with court decisions. Is the Minister arguing that there should not be competency in the Welsh courts?

Gareth Butler

on behalf of the:

Parliament for Wales Campaign Executive

Public Law Wales / Law Society Wales Office

Response to the Welsh Government's Consultation on a
Separate Legal Jurisdiction for Wales

Introduction

1. On 8 June 2012, Public Law Wales and the Law Society Wales Office held a symposium event at which various speakers presented on the question of whether there should be a separate legal jurisdiction for Wales.
2. The agenda and the papers of the speakers' presentations accompany and form part of this response to the Welsh Government's consultation.
3. This paper records on a non-attributable basis the questions that were raised by delegates and the points made during the panel and open forum sessions.

The Scottish Perspective

4. It was noted that Scottish lawyers in the field of personal injury law, and the law of tort more generally, have traditionally "punched above their weight" and have significantly influenced the development of this area of law in England and Wales. This may be partly as a result of the fact that Scottish lawyers are approaching matters on a different basis due to the separate legal jurisdiction in Scotland. Lawyers practising under a separate Welsh jurisdiction would have the potential to do the same.
5. Some delegates expressed concern that a separate Welsh jurisdiction would lead to a risk of "brain drain", with many of the best lawyers being deterred from practising in Wales and looking to practise in England instead. The speaker explained that although this is a serious risk, developments since devolution have meant that this is less of an issue in Scotland. The level and frequency of constitutional reform and public law developments in Scotland mean that many Scottish lawyers practising public law in Scotland would not consider practising elsewhere. Furthermore, while some Scottish students do go to England to practise, there are also a number of English students who choose to practise in Scotland.

6. On a similar note, some delegates expressed concern that universities in Wales would, in the event that a separate Welsh jurisdiction was to be introduced, suffer as a result of English students being deterred from coming to study law in Wales. It was noted that at present it is very rare for English and Welsh students (and, to a lesser extent, Northern Irish students) to go to Scotland to study law with the intention of returning to England or Wales to practise. The speaker expressed the view that this would not necessarily be the case here, as Wales, unlike Scotland, does not have a legal tradition distinct from that of England. There is also some doubt as to whether there would be a desire to create a completely separate system of legal training in Wales. There may, therefore, be greater opportunity for mutual recognition between the two jurisdictions and for lawyers to be dual-qualified to practise in both.
7. Some concern was also raised as to whether a separate Welsh jurisdiction would lead to a very inward-looking, “incestuous” legal profession in Wales. It was, however, acknowledged that the situation would be no different to that in other smaller-sized jurisdictions such as Denmark or New Zealand.
8. The speaker explained how Scotland has been using its separate jurisdiction to promote itself as an alternative location for arbitration, emphasising that it is able to offer a specialist forum for arbitration at a quicker service than that provided in London. There might be similar opportunities for Wales.

Legislative and Administrative Aspects of a Separate Jurisdiction

9. Delegates queried whether a separate legal jurisdiction would become necessary in the event of changes being made to the current devolution settlement in Wales. The speaker’s view was that there would be considerable difficulties if Wales was to move to a reserved powers model of devolution, as is the case in Scotland, without a separate legal jurisdiction. This is because of the need to have one legislature to define precisely what the law is on a particular matter.
10. By way of example, health and health services comprise one of the devolved subjects in Wales and there has been legislation enacted which relates only to health matters in Wales. However, if Wales was to move to a reserved powers model of devolution and one of the reserved matters was contract law, there would

be potential for uncertainty as to whether or not certain contracts involving the NHS in Wales would fall within the reserved matter; there would be consequent potential for uncertainty regarding the legal position in respect of a particular matter. A separate legal jurisdiction for Wales would address this issue.

Panel Session

The following remarks represent the views expressed by a panel of lawyers practising in Wales in the context of their respective areas of law.

Planning and Environment

11. This is an area of law for which the current devolution settlement already allows distinct legislation and policy. Although the main legislation in planning law, the Town and Country Planning Act 1990, applies to both England and Wales, the Act as it applies in Wales is now materially different in significant respects compared to how it applies in England. There have also been a number of pieces of secondary legislation which apply only to Wales.
12. However, it is debatable whether the divergence in the law in this area is sufficient to require a separate legal jurisdiction. Although there is clear divergence in terms of planning policy in England and Wales, this does not necessarily mean that a separate jurisdiction is required as planning inspectors and judges are very familiar with having to interpret and apply different policies in different areas. There is even less divergence in respect of environmental law, largely because the vast majority of this originates from European legislation.
13. Moving forward, however, the legislative programme of the Welsh Government suggests that there may be greater divergence in the law in future. More specifically, the legislative programme sets out proposals to introduce an overarching Sustainable Development Bill, an Environment Bill and a Planning Bill. In respect of environmental law, Wales increasingly wants to position itself as a leader on environmental matters by going beyond the minimum requirements set by European legislation, particularly in relation to waste management. Similarly, in planning law, there appears to be no real appetite in Wales for neighbourhood planning, which was introduced in England through the Localism Act 2011. There also seems to be a reluctance to follow the approach being adopted in England of

moving away from public inquiries and hearings and to deal with a greater number of planning appeals through the written representations procedure. These developments could lead to a significant divergence in the law in this area, which would strengthen the case for a separate jurisdiction.

14. Therefore, although there does not appear to be a need for a separate legal jurisdiction in the context of planning and environmental law at present, this may change in the future as the divergence in the law in England and Wales increases over time.
15. Another point to note is that the Planning Inspectorate is a joint agency serving England and Wales which, generally speaking, commands respect and confidence by those who use the service. A separate legal jurisdiction for Wales might present a need for a separate Planning Inspectorate for Wales. On the other hand, a single body could serve both jurisdictions; although there would be challenges to ensure that both jurisdictions were properly served, there would be flexibility and administrative efficiency, for instance through being able to transfer inspectors between England and Wales.
16. Since the opening of the Administrative Court in Wales, planning and environment decisions which become subject to judicial review are generally heard in Wales. Therefore, to some extent lawyers practising in this area already feel as if they are practising in a separate jurisdiction.

Social Welfare

17. There does not appear to be any strong appetite for a separate legal jurisdiction among social welfare lawyers. Although it is a logical and attractive argument to say that a separate body of law requires a separate legal jurisdiction, it is not clear that the public would benefit from a separate legal jurisdiction at present. Furthermore, there do not appear any clear signs that the "joint" jurisdiction of England and Wales is breaking down and is not going to be fit for purpose for Wales in the future.
18. There are also some concerns as to how a separate legal jurisdiction would work in the context of the current devolution settlement. In terms of the various fields which come within the broad area of social welfare law, whilst education and housing are

to England. This creates a sense of isolation from the local community and hardship for the families involved. These instances of unfairness are a result of there being a single criminal justice system covering England and Wales.

24. There is also a sense of injustice locally with regard to the way in which the legal aid budget is allocated. Approximately half of the legal aid budget of England and Wales is spent on around 300-400 cases involving defendants charged with terrorism offences. However, very few of these cases involve Welsh defendants, which leads to a sense that the legal aid budget is not being allocated fairly. There is, therefore, a feeling that responsibility for the administration of legal aid should rest locally so that a separate Welsh body is able to ensure that legal aid for the poorest individuals in Wales is not put in jeopardy.
25. The creation of a separate Welsh criminal jurisdiction would act as a display of confidence in those that currently administer criminal justice in Wales.

Local Government / Commercial

26. There has already been a significant divergence between England and Wales in the area of local government law, in terms of both primary and secondary legislation. It is, therefore, possible to make a case that a separate legal jurisdiction for Wales is appropriate for this area. Even if it is considered that there is not yet a sufficient divergence in the laws of England and Wales, there is a case to be made for creating a separate legal jurisdiction *before* it is strictly necessary, to allow time for the system to become established before there is a significant divergence.
27. It is to be noted that some courts already sit in Wales, for instance the Administrative Court, the Technology and Construction Court and the Mercantile Court. Given that there is, therefore, already some form of quasi-judicial separation in certain areas of law, it could be argued that we should not view the concept of having a separate legal jurisdiction as a wholly radical move.
28. There is a sense that whilst Wales remains part of the legal jurisdiction of England and Wales, it will continue to be marginalised, particularly in respect of the legal profession's disproportionate focus on London. There is also an argument in terms of fairness, in the sense that Wales should not be treated differently from Scotland and Northern Ireland.

29. There has been some discussion as to whether it is satisfactory for contracts to state that they are subject to “the laws of England and Wales”, as in some cases there will be a divergence between the legal position in England and Wales and it will not be clear which laws are intended to apply. This is likely to be an increasing problem as greater divergence within the law of England and Wales emerges.
30. A separate legal jurisdiction could also provide Wales with an opportunity to “sell itself” on the basis of its legal system. For instance, the vast majority of arbitration work currently takes place in London, even in cases where both parties involved are based in Wales. Provided that the right conditions can be created within a separate jurisdiction, there could be potential for Wales to market itself as an attractive seat of arbitration. This would be on the basis that the legal profession in Wales has the necessary skills and knowledge of English law, and is able to do so considerably cheaper than in London.
31. The costs involved in creating a separate legal jurisdiction would need to be looked at carefully and a proper business case will need to be made, including consideration of such matters as the potential for increasing business coming into Wales under a separate legal jurisdiction. A separate dedicated Welsh court system, rather than the essentially administrative arrangement which currently exists in relation to certain courts could be attractive to business in Wales by providing a quicker service, thereby leading to greater certainty for business.

Open Forum

Set out below is a series of questions posed by delegates and the various responses provided by the speakers on the panel.

32. ***Would it not be better to make the change to a separate legal jurisdiction before there is too great a divergence between the laws of England and Wales?***
 - Timing is an important factor; it would not be sensible to wait until the point at which the system is completely dysfunctional. However, at present, there is not an intellectual case for a change given that there is relatively little divergence in the law. The benefit of debating the issue now is that it provides us with a heightened

state of awareness and forces us think about how the future might look. However, there is a need to see the legislative product of the Welsh Government first, as this will inform us as to the route map and likely timeline for the future of the law in Wales. Only then will it be possible to strengthen the intellectual case for a separate legal jurisdiction.

- There appears to be a general consensus that Wales is likely, at some point in the future, to reach a stage where the divergence between the laws of Wales and England is such that a separate legal jurisdiction for Wales will be necessary. That being the case, there is an argument that the change to a separate legal jurisdiction should be made in the immediate future to allow sufficient time for the system to become established. There is already a quasi-jurisdiction in Wales, through the various courts which now sit in Wales, and this does not appear to have caused any difficulties to the legal profession in Wales or to members of the public. A further consideration to note is that Welsh legislation is drafted bilingually, with each version having equal status. In addition, statute provides a right to use the Welsh language in courts. There is a need to have structures in place to support these distinctive characteristics of the legal system in Wales.

33. *Is there a danger that in focussing too much on the impact of legislation being passed in Wales, we take our eye off the divergence in law which might occur as a result of legislative changes introduced in England only?*

- The idea of waiting until the intellectual case for a separate legal jurisdiction is stronger is not necessarily a recipe for inactivity because the law is diverging as a result of legislative activity in England as well. This will in fact require Wales to give proper consideration as to whether it wants to legislate to do certain things differently and whether these differences can be accommodated within the "combined" jurisdiction of England and Wales.

34. *Looking at the principle of local justice, issues such as crime, planning, community services and child care all "bite" at a local level. Is there, therefore, an argument that the more that decisions on these matters are made at a local level, the better?*

- It is debatable whether there is any sense of injustice as to the sufficiency of local decision-making at the moment. For instance, in relation to the criminal justice

system, there does not appear to be a strong sense of public grievance that decisions are not taken locally. It seems that the better argument to be made is that Wales might want to come to a different judgment on certain criminal justice issues and to formulate rules and norms to reflect those judgments. However, Wales would need to go through that process first before being able to make that argument.

- There is a deficit in criminal justice which bites at a local level, although perhaps this is not necessarily caused by being part of a "combined" jurisdiction or by the court system. Rather, the deficit manifests itself in the way in which people are affected in Wales, for example, by the inadequacy of the provision of custodial services in Wales. This deficit arises because there is only one criminal justice system serving England and Wales. Furthermore, if there were to be separate Welsh courts for certain areas such as planning, local government and family law, then the public may feel aggrieved at having their criminal justice matters administered through a separate, "non-Welsh" system. It is, therefore, necessary to give consideration to the need to introduce a separate jurisdiction in Wales even if criminal justice is not yet a devolved subject in Wales.
 - If criminal justice was to be devolved to Wales as part of the process of creating a separate legal jurisdiction, there would be question marks over whether a legislature with only 60 Assembly Members would have the capacity to administer such a substantial body of law.
 - It should be noted that there has been a rise in the number of Welsh cases heard by the Administrative Court since it has sat in Wales, which suggests that access to justice may have been an issue in Wales in the past. It is possible that the creation of a separate legal jurisdiction would further improve access to justice in Wales.
35. *Is there a risk that a separate legal jurisdiction would marginalise the legal sector in Wales? For example, is it possible that national and international companies operating in Wales might decide that they want their contracts to be governed by the laws of England as a result of having more faith in the court system in England?*
- This is a valid concern. There will inevitably be some organisations who, perhaps unjustifiably, will have concerns as to the ability of a Welsh jurisdiction and the

Ffurflen Ymateb i'r Ymgynghoriad

Eich enw chi: Andrew Currie
Sefydliad ddim yn berthnasol

e-bost / rhif ffôn: [REDACTED]

Eich cyfeiriad: [REDACTED]
Castell-nedd
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Atebion i Gwestiynau'r Ymgynghoriad

1. A ydych yn cytuno y byddai tiriogaeth ddaearyddol ddiffiniedig yn nodwedd hanfodol ar gyfer awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru?

Ydw, yn unol ag awdurdodaethau eraill ar draws y byd.

1.1 Yn eich barn chi, at ddibenion awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru, pa diriogaeth ddylid ei dewis – “Cymru” yn ôl diffiniad Deddf Ddehongli 1978 neu yn ôl diffiniad Deddf Llywodraeth Cymru 2006?

Diffiniad Deddf Llywodraeth Cymru 2006, yn gyntaf am fod y Ddeddf uchod yn cyfeirio'n benodol at ddibenion deddfu, ac yn ail oherwydd y bydd angen deddfwriaeth ar brydiau sy'n ymwneud â'r amgylchedd a ddylai gynnwys y dyfroedd o gwmpas Cymru.

2. Ydy corff neilltuol o gyfreithiau yn nodwedd hanfodol ar gyfer awdurdodaeth gyfreithiol ar wahân ac, os felly, i ba raddau?

Ydy, dyna'r prif nodwedd, os nad yr unig un.

2.1 Pryd y gellir dweud bod corff o gyfreithiau yn ddigon 'neilltuol' yn hyn o beth?

Yn bwysicach na hyn yn y cyd-destun hwn mae'n debyg yw'r ffaith y bydd cyfreithiau penodol Cymru yn tyfu'n gynyddol yn y dyfodol.

2.2 A oes ots ai'r gyfraith statud ynteu'r gyfraith gyffredin yw'r gyfraith dan sylw?

Nac oes, o ran egwyddor.

2.3 A oes ots beth yw natur pwnc y cyfreithiau, er enghraifft troseddol, sifil, teulu?

Nac oes.

3.4 A fyddai angen Uchel Lys a/neu Lys Apêl ar wahân ar Gymru?

Byddai. Mae gan Ogledd Iwerddon Lys Apêl y gellir apelio yn erbyn ei benderfyniadau i'r Goruchaf Lys. Gellid llunio trefn debyg ar gyfer Cymru.

8. Ydy awdurdodaeth gyfreithiol Cymru a Lloegr yn gynaliadwy yn y tymor hir o ystyried y posibilrwydd y bydd y cyfreithiau sy'n gymwys yng Nghymru yn ymwahanu fwyfwy wrth y rheini sy'n gymwys yn Lloegr a gweddill y Deyrnas Unedig?

Nac ydy. Bydd y gwahaniaethau rhwng y ddwy wlad yn tyfu'n ddi-dderfyn. Mae'n werth cofio hefyd bod Cymru a Lloegr ond yn rhannu'r un awdurdodaeth yn y lle cyntaf oherwydd bod y ddwy wlad yn rhannu un set o gyfreithiau.

15. Beth yw goblygiadau posibl awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru o ran cyfraith ryngwladol breifat (neu "wrthdaro cyfreithiau") rhwng Cymru a gweddill y Deyrnas Unedig?

Yr un goblygiadau ag awdurdodaethau eraill y Deyrnas Unedig, mwy na thebyg.

16. Pe bai Cymru'n symud tuag at fath o ddatganoli gyda 'phwerau wedi'u cadw', fel yn yr Alban, a fyddai awdurdodaeth ar wahân ar gyfer Cymru, yn eich barn chi, yn:

- a. hanfodol;
- b. dymunol;
- c. annymunol; neu
- ch. amherthnasol?

Yn hanfodol.

17. A fyddai awdurdodaeth ar y cyd rhwng Cymru a Lloegr yn gynaliadwy pe bai datganoli'n cael ei ehangu yng Nghymru?

Na fyddai.

21. A fyddai creu awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru'n effeithio ar y gyfraith gyffredin sydd wedi datblygu fel rhan o awdurdodaeth gyfreithiol unedig Cymru a Lloegr?

Na fyddai. Mae enghraiffti o hyn wedi digwydd rhwng Tiriogaethau Gogledd Orllewin Canada a thiriogaeth newydd Nunavut, a fu'n rhan o Dirioogaethau'r Gogledd Orllewin hyd at 1999.

22. A fyddai'ch ateb yn wahanol pe bai system lysoedd ar wahân yng Nghymru?

Na fyddai.

28. A fyddai'ch atebion i unrhyw rai o'r cwestiynau yn y papur ymgynghori hwn yn wahanol pe bai cymhwysedd deddfwriaethol y Cynulliad yn cael ei drin yn yr un ffordd â chymhwysedd deddfwriaethol Senedd yr Alban – hynny yw pe bai gan y

Cynulliad gymhwysedd dros bob mater ac eithrio'r rhai a gedwir yn benodol gan Senedd y Deyrnas Unedig?

Byddai hyn yn gwneud yr achos o blaid awdurdodaeth ar wahân hyd yn oed yn gryfach.

29. Rydym wedi gofyn nifer o gwestiynau penodol. Os oes gennych unrhyw faterion cysylltiedig nad ydyn ni wedi mynd i'r afael â nhw, defnyddiwch y lle hwn i wneud hynny:

Sylwadau Cyffredinol

Mae'r syniad y tu ôl i'r ymgynghoriad hwn yn un gwyb. Wedi dweud hynny, mae'n debyg y dylid bod wedi penderfynu ar ba fath o ymgynghoriad y gobeithiwyd ei weld cyn ei lansio, sef:

- ymgynghoriad ar gyfer y cyhoedd yn gyffredinol, neu
- ymgynghoriad ar gyfer y proffesiynau cyfreithiol yn unig

Mewn gwirionedd, efallai bod agen y ddau. Fodd bynnag, mae'r wefan isod:

<http://wales.gov.uk/newsroom/firstminister/2012/120612legaljurisdiction/?skip=1&lang=cy>

yn nodi bod "Cwnstler Cyffredinol Llywodraeth Cymru yn annog pobl i ddweud a ddylai Cymru hefyd fod yn awdurdodaeth gyfreithiol ar wahân ai peidio". Er hynny, mae nifer sylweddol o'r cwestiynau yn rhai nad oes modd eu hateb yn effeithiol os nad ydych yn arbenigwr sy'n gweithio o fewn y proffesiynau cyfreithiol.

Mewn gwledydd democrataidd, nid yw awdurdodaethau cyfreithiol ond yn bodoli er mwyn gwasanaethu eu dibenion eu hunain. Maent hefyd yn gweinyddu cyfiawnder ac felly'n effeithio ar fywydau beunyddiol y rhai sy'n dod o dan eu hawdurdod. Gyda hynny mewn golwg, rhai o ganlyniadau posibl cael awdurdodaeth ar wahân ar gyfer Cymru felly fyddai:

- codi hyder poblogaeth Cymru yn gyffredinol yn eu gallu i wneud pethau ar eu pennau eu hunain
- gwella'r berthynas gyfansoddiadol rhwng Lloegr a gwledydd datganoledig y Deyrnas Unedig drwy lunio awdurdodaeth a thiriogaeth ddaearyddol ddiffiniedig arbennig i Loegr

Yn achos yr ymgynghoriad hwn, teimlaf y bu gormod o bwyslais ar weithdrefnau ymarferol sy'n ymwneud â gweinyddu cyfiawnder yn fewnol, a dim digon ar sut y bydd unrhyw newidiadau yn effeithio ar y boblogaeth gyffredinol ar y tu allan, yn enwedig o gofio'r bleidlais o blaid rhoi pwerau deddfu sylfaenol i'r Cynulliad yn y refferendwm yn 2011.

Beth oedd disgwyliadau'r rhai a bleidleisodd o blaid trosglwyddo'r pwerau hynny tybed? Ai gweld y ddeddfwrfa newydd yn dal i gael ei chlymu wrth yr hen un, ynteu

gweld awdurdodaeth newydd yn dod i fodolaeth wedi ei seilio ar yr egwyddor bod gan bob deddfwrfa benodol ei hawdurdodaeth benodol? Mae digon o dystiolaeth i awgrymu bod yr egwyddor hon wedi hen sefydlu ar draws y byd, gan gynnwys gwledydd y gyfraith gyffredin. Does dim un o daleithiau Unol Daleithiau America, er enghraifft, yn rhannu awdurdodaeth â thalaith arall. Mae'r un peth yn wir am daleithiau a thiriogaethau Awstralia (http://www.dfat.gov.au/facts/legal_system.html) yn ogystal â rhanbarthau a thiriogaethau Canada (<http://www.justice.gc.ca/eng/dept-min/pub/ccs-ajc/page3.html>).

Yn wir, mae Canada yn cynnig enghraifft ardderchog o'r egwyddor hon yn achos Nunavut. Fe sefydlwyd Nunavut fel tiriogaeth a deddfwrfa newydd yng Nghanaada yn 1999. Cyn hynny, roedd Nunavut yn rhan o Dirioogaethau Gogledd Orllewin Canada, Fe luniwyd awdurdodaeth a llys cyfiawnder newydd **ar yr un diwrnod** â'r deddfwrfa newydd. Roedd hynny wrth reswm yn gwahanu Nunavut rhag yr hen diriogaeth.

Mae'n debyg nad oes unman arall yn y byd ac eithrio Cymru a Lloegr lle mae dau gorff deddfwriaethol yn rhannu un awdurdodaeth (gweler isod):

<http://www.clickonwales.org/2011/05/lifting-the-fog-surrounding-devolution/>

Y cwestiwn y dylid ei ofyn felly, yn hytrach nag "a oes cyfiawnhad dros lunio awdurdodaeth ar wahân ar gyfer Cymru?" yw "a oes cyfiawnhad dros **beidio** â llunio awdurdodaeth ar wahân ar gyfer Cymru?" nawr bod gan Gymru bwerau deddfu sylfaenol.

Yn hyn o beth, mae Gogledd Iwerddon yn cynnig fframwaith ardderchog i Gymru ei ddilyn. Mae'n rhan o'r Deyrnas Unedig, yn awdurdodaeth gyfraith gyffredin, a does dim rhaid i'r rhai sydd wedi eu hyfforddi i weithio yno ailhyfforddi i weithio yng Nghymru a Lloegr nac fel arall. Mae ganddi gyfrifoldeb ar draws ei thiriogaeth ei hun dros faterion sifil a throseddol, yn ogystal â Llys Apêl ar lefel o dan Goruchaf Lys y Deyrnas Unedig. Mae Gogledd Iwerddon hefyd yn llai na Chymru o ran poblogaeth ac arwynebedd, ac felly mae'n anodd gweld pam na fyddai modd i Gymru ddilyn llwybr tebyg.

Eisoes yn ei hanes byr mae'r Cynulliad wedi gorfod neidio dros nifer o rwystrau gwahanol i gyrraedd y fan hon. Mae'n hen bryd bellach i ni symud ymlaen at system gyfiawnder addas yn hytrach nag aros yn yr unfan oherwydd bod ambell i wledydd neu was sifil yn gyndyn iawn i newid pethau neu golli ychydig o rym.

N/A – for the reasons set out above.

2.2 Does it matter whether the law in question is statute law or common law?

N/A – for the reasons set out above.

2.3 Does it matter what the nature of the subject-matter of the law is – e.g. criminal, civil, family?

N/A – for the reasons set out above.

3. To what extent (if any) is the separation of responsibilities (i.e. Wales from England) for the administration of justice an essential feature of a separate legal jurisdiction?

We believe that *the* essential feature of a separate legal jurisdiction is a separate legal system with the responsibility for the administration of justice within that defined geographical territory.

3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?

A separate Welsh legal jurisdiction is incompatible with a unified England and Wales court system. In the example given at page 6 of the Consultation Document, the significant difference between Wales and Scotland therein is that Scotland has its own separate court system. In our view, the issue raised therein is not so much that Acts of the Assembly form part of the laws of England and Wales - it is that Norwich County Court is currently just as much part of the court system of Wales as Caernarfon County Court.

3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?

We believe that a separate Welsh legal jurisdiction would require the separation of the offices of a judge of Wales and a judge of England.

We do not believe, however, that it is incompatible with a separate Welsh legal jurisdiction that one person could hold both offices, and sit as a judge in both jurisdictions.

3.3 If there were a separate Welsh courts system, which courts would be affected?

As criminal practitioners, we believe that the criminal courts of Wales ought to form part of any separate Welsh legal jurisdiction. The administration of criminal justice is a matter of key importance. Of all the courts, it is perhaps within the criminal courts that the principle of local justice is most important. Although criminal justice is not presently a devolved subject matter, the Assembly can, and

does, create new criminal offences as part of the enforcement provisions of legislation within its competencies. As the body of distinct Welsh law grows so will the body of distinct Welsh criminal offences. In the event of the establishment of a separate Welsh legal jurisdiction, we believe that as a matter of democratic legitimacy it would be crucial that criminal justice was administered and seen to be by that jurisdiction.

3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?

In the event of the establishment of a separate Welsh legal jurisdiction we believe that a High Court and a Court of Appeal for Wales ought to be established for criminal matters.

As stated above, we do not believe that it is incompatible with a separate Welsh legal jurisdiction that a person may sit as a judge in both the Court of Appeal (Criminal Division) in England and an equivalent Court of Appeal in Wales.

3.5 Should Wales continue to share some courts with England, and if so, which ones?

We believe that in cases involving a point of law of general public importance an appellant ought to have the right to seek leave to appeal to the UK Supreme Court from any Welsh Court of Appeal decision, including criminal matters.

3.6 If Wales and England continued to share some courts, what (if any) changes might be needed in the organisation of those courts?

We believe that the Supreme Court ought, in the above circumstances, to include fixed representation from Wales as part of their number.

4. To what extent (if at all) would it be necessary for the devolved legislature to have general legislative competence over the criminal law as a separate devolved subject if responsibility for the administration of justice was devolved?

In accordance with our response to question 2 above, we do not believe that it is essential to a separate Welsh criminal jurisdiction that there is a distinct body of Welsh criminal law.

Nor do we regard it as essential to a separate criminal jurisdiction that the devolved legislature has a general legislative competence over the criminal law. After all, prior to 1999, Scotland had no devolved legislature at all, and yet had a separate Scottish criminal jurisdiction. The law applied in the criminal courts of Scotland prior to 1999 was that passed by the UK Parliament.

4.1 Are there any other subjects of legislative competence that should be devolved in such a case?

We believe that legislative competence in relation to policing, prisons, the probation service and legal aid ought to be devolved. The fair and effective operation of the criminal courts is dependent upon the policy and co-operation of those agencies.

5. How might a unified England and Wales court system work if:

5.1 There were a separate Welsh legal jurisdiction and the Assembly's legislative competence:

- a. remained, as now, with the ability to expand incrementally, or
- b. extended over all matters except for those expressly reserved to the UK Parliament?

We believe that the essence of a separate Welsh legal jurisdiction is the existence of a separate Welsh court system. To the extent that the court system of England and Wales remains shared, there will continue to be only a single jurisdiction of England and Wales.

5.2 The current unified legal jurisdiction of England and Wales continued and the Assembly's legislative competence:

- a. remained, as now, with the ability to expand incrementally, or
- b. extended over all matters except for those expressly reserved to the UK Parliament?

No doubt a unified England and Wales court system would work as it does now but an increasing divergence in law would create greater political and practical pressure upon the system. The greater the legislative competence of the Assembly (whether by incremental expansion or a move to the 'express reservation' model), the greater the imperative will be for a separate Welsh jurisdiction.

6. When reference is made to a 'legal jurisdiction' in the sense of England and Wales being a legal jurisdiction separate from, for example, Scotland what, in its simplest form, does that mean?

The essence of a separate legal jurisdiction is the existence of a separate court system.

6.1 In this context does legal jurisdiction just mean the territory over which the legislature (or executive) has power to legislate?

No – prior to 1999, the sole legislature for Scotland was the UK Parliament. The territory over which the legislature had power to legislate was the United Kingdom of Great Britain and Northern Ireland. The UK Parliament still retains the power to legislate over the entire UK, including Scotland. In this context, legal jurisdiction instead means the territory over which a court system has the authority to apply, interpret and enforce the law.

7. Are there any other essential features of a separate legal jurisdiction?

The essential feature of a separate legal jurisdiction is a separate court system. Other common features of a separate legal jurisdiction such as a separate legal tradition and a separate legal profession are neither essential to a separate legal jurisdiction nor inevitable, and there may be good reasons why in Wales they would be undesirable – such as a shared common law tradition and close proximity in geographical terms.

8. Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest of the UK?

No. The status quo has been altered by the fact of devolution. Wales is increasingly a political and legal entity in its own right. It appears to us that increasing bodies of Wales-only legislation passed by the Assembly and England-only legislation passed by the UK Parliament (following the Sewel convention) will inevitably, at some point in the future, reach the position where politically separate jurisdictions will be required to maintain democratic legitimacy.

9. If you consider that the current legal jurisdiction is sustainable then are there any short-term or long-term changes that should be made to any of the following?

a. The administration of the courts and/or tribunals systems

The Crown Court in Wales is already administered as a single administrative unit.

The Court of Appeal (Criminal Division) ought to sit more frequently in Wales.

There ought to be an office of the Criminal Appeal Office established within Wales, as there is for the Administrative Court Office of the High Court.

The excepted classes of claim in paragraph 2.1(2) and 3.1 of the Practice Direction 54D – Administrative Court (Venue) in relation to Part 54 of the Civil Procedure Rules ought not to apply to Part 54 proceedings in Wales.

b. The judiciary (including the magistracy)

c. The legal professions (including their regulation)

d. Education and training in law

e. Accessibility of legislation

See paragraphs 20 and 20.1 below.

10. If you consider that the current legal jurisdiction is sustainable then are there any other short-term or long-term changes that should be made?

There ought to be a wider process of bringing justice – particularly criminal justice - closer to the community in Wales.

There can be no doubt that there is a deficit at present.

It is a fact, for example, that there is no female prison in Wales.

It is a fact that there is no high security prison in Wales.

It is a fact that there is no prison at all in Wales, north of Usk/Prescoed.

That remoteness causes:

- Additional hardship to families;
- Increases the isolation of prisoners from their communities, making re-engagement more difficult on release; and
- Detaches communities from the consequences of offending within their ranks, lessening any deterrent effect of sentencing and diminishing any sense of shared responsibility for matters going wrong.

Those sent from Wales to prisons elsewhere include not only those convicted of offences but also those accused of wrongdoing awaiting trial, amongst them those who are innocent.

That gap in the provision of criminal justice for the community in Wales ought to be addressed.

Similarly, legal aid provision ought to reflect the different priorities existing in Wales and the responsibility for its administration within Wales should rest here.

When answering the following questions (11 to 15 (inclusive)) it would be helpful if you could provide your answers firstly on the basis of a unified England and Wales court system and secondly on the basis of a separate Welsh court system.

We believe that the essence of a separate Welsh legal jurisdiction is the existence of a separate Welsh court system responsible for the application, interpretation and enforcement of the law within Wales. To that extent, the answers to the questions below are given on the basis of a separate Welsh court system.

11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognized as a law in other jurisdictions within the UK?

No. Such statute law could not be recognized as law in jurisdictions to which it did not extend, but there is no reason to think that it would not be recognized by other jurisdictions within the UK as the law extending to and applicable in Wales.

12. Would such statute law be judicially noticed in those other jurisdictions?

All Acts of the UK Parliament are to be judicially noticed as a public Act, whether they extend to the whole of the UK or only to part of it (section 3 of the Interpretation Act 1978). At present, Acts and Measures of the National Assembly, however, are excluded by section 23B of the 1978 Act from the scope of section 3 of that Act.

13. Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions – e.g. for enforcement or through judicial review?

The use of statute law extending only to Wales in other jurisdictions would be subject to the usual rules on the conflict of laws. The enforcement of Welsh judgments in other jurisdictions is a matter for arrangement between jurisdictions but there is no reason to think that Welsh judgments would not be enforceable in the same way as judgments in different jurisdictions within the UK are enforced at present.

14. Would such statute law be capable of being the subject of criminal proceedings in those other jurisdictions – e.g. arrests, charge, prosecution, conviction and sentencing?

There can be no doubt that an appropriate framework for the enforcements of warrants and the arrests of suspects across jurisdictions can be put in place, but that charge, prosecution, conviction and sentencing would be a matter for the courts in Wales only.

15. What are the potential implications of a separate Welsh legal jurisdiction in terms of private international law (or “conflict of laws”) between Wales and the rest of the UK?

There are no implications – the usual rules on conflict of laws would apply, as they do at present between other jurisdictions within the UK.

16. In the event that Wales moved towards a ‘reserved powers’ form of devolution, like Scotland’s, do you think a separate Welsh legal jurisdiction would be:

- a. essential;
- b. desirable;
- c. undesirable; or
- d irrelevant?

See paragraphs 5.2 and 8 above and paragraph 17 below.

17. Would the shared England and Wales jurisdiction be sustainable if Welsh devolution were widened?

We share the view of the First Minister and Counsel General that the devolution of powers to the Welsh Government and Assembly will inevitably mean more distinct Welsh law applying in Wales in the future. The wider the scope of devolution, the greater the divergence in law is likely to be, both as a result of legislative activity in Wales, and a growth in legislation passed by the UK Parliament with application only in England as a result of the Sewel convention.

As the law as it applies in Wales diverges from the law as it applies in England, the practical and political imperative for a separate jurisdiction in Wales is bound to grow with it.

18. If it would be sustainable, which areas of law would need to be reserved to the UK Parliament?

N/A – for the reason set out above.

19. Would the emergence of a separate Welsh legal jurisdiction require the removal of the Assembly's power that enables it in certain circumstances to make laws applying in England?

Yes.

19.1 Would there be any legal, constitutional or practical difficulty in the Assembly retaining such a power:

a. upon the basis that any provision made in relation to England would extend to and form part of the law of England?

b. otherwise, and if so how?

The Assembly's legislative competence ought to extend only to the territory of a separate Welsh legal jurisdiction. The imposition of legislation on a territory which has no democratic say in the creating legislature raises questions of legitimacy. Legal provision in England to assist in the effectiveness and enforcement of legislation extending only to Wales ought to be determined by agreement between the UK Government and the Welsh Government, and should be subject to the consent of Parliament.

19.2 If you think that there would be such difficulties:

a. what are they?

b. would those difficulties be any different to the current situation where the Assembly already has the power to make provision applicable in England?

See paragraph 19.1 above. The question of democratic legitimacy referred to therein is also raised by the present situation. The present situation, it seems to us, exists only as a result of the contrivance of a distinction between 'the application' and 'the extent' of a law.

20. To what extent (if any) is the concept of a separate Welsh legal jurisdiction compatible with the unified England and Wales legal profession?

We do not believe that a separate Welsh legal jurisdiction is incompatible with a unified England and Wales legal profession. Unlike Scotland and Northern Ireland, England and Wales will always share both a common law tradition and a close geographical proximity. Whilst a divergence in the law which applies within the two territories of England and of Wales will create practical issues regarding training and continuing professional development, existing divergences in the applicable procedural rules within the different courts, tribunals and practice areas of the jurisdiction of England and Wales demonstrate that separate legal professions with different regulatory bodies is not inevitable.

20.1 What are the potential effects (if any) of a separate Welsh legal jurisdiction on the following aspects of the legal professions?

a. education and training;

b. qualification;

c. regulation.

It is recognized that a divergence in law will create issues regarding education and training and continuing professional education. That will be the case whether there is a separate Welsh legal jurisdiction or not. As set out above, however, existing differences in law and procedure between different courts, tribunals and practice areas within the jurisdiction as it presently stands demonstrate that separate qualification and regulation is not inevitable.

21. Would the common law that has evolved as part of the unified jurisdiction of England and Wales be affected by the creation of a separate Welsh legal jurisdiction?

The creation of a separate Welsh legal jurisdiction would by definition create the possibility of a divergence between legal precedent that is binding in England and legal precedent that is binding in Wales, although the reality must surely be that English case-law would continue to be very much part of the canon of Welsh case-law. As long as the Court of Appeal in London remains persuasive, no great divergence in the common law is likely (and if it does not so remain, then there should be no fear from departing from it). Further, in relation to points of law of general public importance, the cross-jurisdictional role of the Supreme Court ought to ensure consistency at that level.

22. Would your answer be different if there was a separate court system in Wales?

N/A – for the reasons set out above.

23. Would your answer be different if the Assembly had legislative competence generally over all (or most of) the:

a. criminal law;

b. civil law; or

c. any other area of law that you do not consider falls within (a) or (b)?

No.

24. Could there be express reservations excluding the common (judge-made) law from the legislative competence of the Assembly?

No. Any such provision would effectively oust the competence of the Assembly from subject matters for which Parliament has given competence under Schedule 7 of the Government of Wales Act 2006 where a court has ruled on a matter falling within the scope of Schedule 7.

24.1 Why would that be desirable, and how would it work in practice?

N/A – for the reasons set out above.

24.2 How difficult would that be?

N/A – for the reasons set out above.

25. Are there any wider economic (including resources), legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?

The decision as to whether there should be a separate Welsh jurisdiction or not is ultimately a political issue rather than a legal one.

It is accepted that there will be significant issues regarding cost involved.

What is not clear, however, is whether to operate a separate Welsh jurisdiction will cost any greater sum *in toto* than the operation of a unified jurisdiction at present.

The call to reduce the deficit in the provision of local prison space in Wales made in paragraph 10 above will no doubt require the allocation of significant resources. Whether the reduction of that deficit is more or less pressing than the reduction of any other deficit currently taxing governments is a political matter.

On the other hand, we believe that the devolution of the provision of legal aid within Wales may allow for the creation of a fairer yet, at the same time, more cost-effective system in Wales.

Undoubtedly, the creation of a separate Welsh jurisdiction would require, in order to maintain it, an expansion of the capacity and expertise of the legal sector in Wales (the judiciary, the Bar, litigators, academics, publishers and beyond). That is a challenge to be embraced, not shied away from. We believe that there is the talent in Wales to rise to that challenge.

26. Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?

It is clear that a separate Welsh jurisdiction would require the development of a significant legal publishing sector within Wales – again, that ought to be seen as a challenge to be embraced, not shied away from.

27. In a specifically Welsh context, are there any additional features that would be appropriate for a separate legal jurisdiction to operate effectively?

No.

28. Would your answers to any of the questions in this consultation paper be different if the approach to the Assembly's legislative competence was the same as that of the Scottish Parliament – i.e. if the Assembly had competence over all matters except those expressly reserved to the UK Parliament?

No.

29. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed please tell us about them.

N/A



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18th June 2012

The Constitutional Policy Team
Welsh Government
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To whom it may concern

RE: A separate legal jurisdiction for Wales

The Federation of Small Businesses Wales welcomes the opportunity to present its views to the Welsh Government on the matter of a separate legal jurisdiction for Wales. FSB Wales is the authoritative voice of small businesses in Wales. With 10,000 members, a Welsh Policy Unit, two regional committees and twelve branch committees; FSB Wales is in constant contact with small businesses at a grassroots level. It undertakes a monthly online survey of its members as well as an annual membership survey on a wide range of issues and concerns facing small business.

Introduction

FSB Wales recognises the need for a resolution to the question of Wales' place in the legal constitution of the United Kingdom, particularly following the referendum on enhanced primary legislative powers on March 3rd 2011 and in light of the ongoing work of the Silk Commission.

Clearly, the decision on the exact nature of Wales' legal jurisdiction is a political one. As a consequence, FSB Wales does not endorse any specific policy option. However, FSB Wales believes that further constitutional questions posed by the creation of a distinct body of law in Wales will inevitably arise following the 2011 referendum. Accordingly, this necessitates decisive action in order to provide small businesses with the clarity they both need and deserve.

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Defining a separate legal jurisdiction for Wales

Defining the term "separate legal jurisdiction for Wales" is an arduous task, especially for those not of the legal profession. However, given the existence of distinctive legal jurisdictions in Scotland and perhaps more importantly Northern Ireland, it is possible to do so within the context of the UK constitution. As Professors Wincott and Lewis of the Wales Governance Centre note in their submission to the Constitutional and Legislative Affairs Committee inquiry into this issue:

In the Court system, the Courts of England and Wales, of Scotland and of Northern Ireland have exclusive jurisdiction over most cases which arise in the respective territories, but they are all subject to the ultimate authority of the Supreme Court of the United Kingdom, and all these courts are subject to, and can be overruled by, the European Court of Justice in certain cases.¹

Therefore, the extent to which a Welsh legal jurisdiction would be separate would be reflective of the situation already in existence in the other devolved nations of the UK whereby devolved legislatures operate within distinct legal jurisdictions with shared institutions such as the Supreme Court providing clarity on certain UK wide issues². A distinct Welsh legal jurisdiction would also operate within the context of shared European courts.

The current situation

At present, the National Assembly has the ability to create law but has no power over the administration of the law it creates. Clearly, this is a constitutional anomaly that will likely pose greater problems for business as the laws of Wales and the laws of England and Wales diverge. To this end we would support the point that many characteristics of a distinct legal jurisdiction are already in existence in Wales and that the question at hand is actually about the competency of the courts of England and Wales to efficiently and fairly administer justice relating to Wales only legislation. This point is reinforced by academic submissions to the Constitutional and Legislative Affairs Committee's inquiry, such as Bangor Law School which highlights the emerging characteristics of a Welsh legal jurisdiction³. It is also important to note that divergence will also occur as a result of legislation emanating from the UK Parliament that relates to England only.

Indeed, divergence is already apparent in some aspects of the courts system with examples such as the HMCTS (Wales) and the Mercantile Court for Wales offering some form of decentralisation within the England and Wales context under the auspices of the UK Government, in order to deal with these issues. FSB Wales is of the opinion that the current unitary nature of the England and Wales jurisdiction will become increasingly difficult to sustain in the long term and will not be reflective of the legal, cultural and

¹ Wilcott, D. and Lewis, E. *Memorandum To The Constitutional And Legislative Affairs Committee Of The National Assembly's Inquiry Into The Establishment Of A Separate Welsh Jurisdiction* [Online]. Available at: <http://www.cardiff.ac.uk/europ/resources/WGC/Jurisdiction%20paper%20-%20ET%20and%20DW%20Feb12.pdf> (Accessed 12th June 2012)

² www.supremecourt.gov.uk. 2012. *Role of the Supreme Court* [Online]. Available at: <http://www.supremecourt.gov.uk/about/role-of-the-supreme-court.html> (accessed 8th June 2012).

³ Bangor Law School. Submission to the Constitutional and Legal Affairs Committee of the National Assembly for Wales [Online]. Available at: <http://www.senedd.assemblywales.org/documents/s5904/Consultation%20responses.pdf> (accessed 12th June 2012)

political context of Wales, without action to redress this issue. As a result, businesses, particularly small enterprises without recourse to in-house or specialist legal advice are likely to be disadvantaged in comparison to larger companies. The same would doubtless apply to charities, social enterprises and community groups.

In light of this, FSB Wales believes that clarity is of the utmost importance to businesses that operate in Wales and across the UK. The current devolution settlement has often been unclear and has led to confusion over where responsibility for certain issues lie. FSB Wales believes that this has been to the detriment of its members who value certainty in their trading environment. Decisive action is required to create a lasting solution to this issue and FSB Wales believes that the situation in Northern Ireland provides an intriguing example for decision makers to consider when framing Wales' future legal requirements. To this end the anomalies that exist between the devolved settlements of Northern Ireland and Scotland as jurisdictions based on 'reserved' powers and Wales with its 'defined' powers needs also to be addressed⁴.

Northern Ireland

While it is widely acknowledged that the Scottish situation is not comparable to Wales due to historical reasons; the Northern Ireland example provides a precedent in that its jurisdiction was created fairly recently as a result of a political decision leading to the Government of Ireland Act 1920⁵. The FSB recognises that prior to the 1920 Act, there was no distinct legal jurisdiction in Northern Ireland and this developed quickly as a result of the act. A sustainable jurisdiction is now in place in Northern Ireland that shares many commonalities with the legal system of England and Wales and fits within the UK and EU constitutional context. There is also a degree of comparability within the legal professions of Northern Ireland and England and Wales and this could be maintained in Wales on a similar basis.

FSB Wales is of the opinion that the clarity provided by such a settlement would be of greater benefit than the confusion that would result if only further decentralisation or partial autonomy was achieved within the England and Wales jurisdiction. This would also provide greater symmetry in Wales to the devolution settlements in Northern Ireland and Scotland and the wider constitutional debate across the UK.

Cross-border implications

While the need for clarity is paramount, it is also important that decision makers consider the cross border implications of a distinct legal jurisdiction for Wales. FSB Wales recognises that as the laws of England and Wales diverge cross border issues will increase. Therefore, it is vital that businesses and in particular small businesses that do not always have the capacity to deal with legal issues as larger businesses would, are not impeded by the creation of a Welsh jurisdiction. Again, there is precedent for cross border issues being dealt with across jurisdictions within the UK and FSB Wales would urge the Welsh Government to consider this closely in examining its position on this matter⁶. Arguably, Wales'

⁴ Trench, A. 2012. *A Welsh legal jurisdiction, and its effects on legislation* [Online]. Available at: <http://devolutionmatters.wordpress.com/> (accessed 14th June 2012)

⁵ Wilcott, D. and Lewis, E. *Memorandum To The Constitutional And Legislative Affairs Committee Of The National Assembly's Inquiry Into The Establishment Of A Separate Welsh Jurisdiction* [Online]. Available at: <http://www.cardiff.ac.uk/europ/resources/WGC/Jurisdiction%20paper%20-%20ET%20and%20DW%20Feb12.pdf> (Accessed 12th June 2012)

⁶ www.cps.gov.uk. *Guidance* [Online]. Available at: [http://www.cps.gov.uk/legal/h to k/jurisdiction/](http://www.cps.gov.uk/legal/h%20to%20k/jurisdiction/) (accessed 12th June 2012)

border with England is more porous than those between Scotland/Northern Ireland and England; therefore careful attention needs to be paid in order to ensure that there are no negative implications for small businesses who work across both borders. It must also be remembered that Wales already shares, via transport hubs and established trading partnerships, a border with the separate legal jurisdiction of the Republic of Ireland.

Furthermore, Welsh law shouldn't be framed in a way that dissuades small businesses in Wales from incorporating or locating in Wales. Changes to incorporation for businesses in Wales would also have an impact on rights of redress, which should be considered carefully. FSB Wales acknowledges that precedent for these issues around cross border working will have been set by the relationship between Northern Ireland/Scotland and the England and Wales jurisdiction at present.

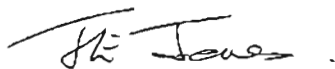
In this respect, issues around company and employment law are of importance to the common market across the UK (and the wider European Union) and efforts should be made to ensure that Wales is not disadvantaged in relation to them. Indeed, these issues are largely reserved to Westminster under the present model of devolution in Northern Ireland and Scotland and this should also be true of Wales⁷⁸. Furthermore, FSB Wales recognises that in the subjects of company and employment law there are significant implications from legislation developed on an EU wide basis⁹.

Conclusion

In conclusion, FSB Wales urges the Welsh Government to consider this issue carefully and to work with the UK Government to provide a lasting settlement that gives clarity to small businesses in Wales. FSB Wales recognises that the implications of devolution on the courts system must be accommodated to ensure efficiency in the administration of justice in Wales and believes that precedent from across the UK, particularly in Northern Ireland, can and should be learnt from. Finally, both the Welsh and UK Governments must ensure that any changes to the devolution settlement in the future provide clarity for businesses and do not adversely affect their trading environment.

I hope you find the comments of FSB Wales of interest.

Yours sincerely



Janet Jones
Wales Policy Chair
Federation of Small Businesses Wales

⁷ Scotland Act 1998. [Online] Available at: <http://www.legislation.gov.uk/ukpga/1998/46/schedule/5> (accessed 12th June 2012).

⁸ Northern Ireland Act 1998. [Online] Available at: <http://www.legislation.gov.uk/ukpga/1998/47/schedule/3> (accessed 12th June 2012).

⁹ Hug, A. and Tudor, O. 2012. *Single Market, Equal Rights? UK Perspectives on EU Employment and Social Law*. London; Foreign Policy Centre



JUDICIARY OF
ENGLAND AND WALES

THE RIGHT HONOURABLE THE LORD JUDGE

The Rt Hon Carwyn Jones AM
The Counsel General Theodore Huckle QC
The Constitutional Policy Team
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15 June 2012

Dear *Carwyn*,

As Chair of the Welsh Committee of the Judges' Council, I have pleasure in enclosing our response to the Welsh Government's consultation document on a separate legal jurisdiction for Wales. Further to our discussions on this issue, I am grateful to you for continuing to ensure that the Welsh Committee of the Judges' Council is the forum through which judges are contacted on issues concerning Wales.

All good wishes,

Jm.



JUDICIARY OF
ENGLAND AND WALES

THE RIGHT HONOURABLE THE LORD JUDGE

RESPONSE OF THE WELSH COMMITTEE TO THE WELSH
GOVERNMENT CONSULTATION ON A SEPARATE JURISDICTION FOR
WALES

1. This response to the Welsh Government's consultation into the establishment of a separate legal jurisdiction for Wales is submitted by the Welsh Committee of the Judges' Council (hereafter, 'the Welsh Committee').
2. The Judges' Council was first established under the Judicature Act 1873. In its modern form it is one of the bodies through which the Lord Chief Justice exercises his responsibilities under the Constitutional Reform Act 2005. The Welsh Committee provides advice and consideration of specific matters affecting the administration of justice in Wales.
3. The Lord Chief Justice's interest with respect to constitutional change in Wales, and that of the Welsh Committee, is in the preservation of the rule of law, the promotion of judicial independence, and the effective delivery of justice to the people of Wales. It would be inappropriate for the Welsh Committee to comment on the desirability or otherwise of the creation of a separate jurisdiction for Wales, or on any consequential political issues which may arise. Nor is it the role of the Welsh Committee to focus on questions of primarily academic concern, or to comment on issues which could later come before the courts for determination.
4. In consequence, this response does not seek to answer each question raised in the Welsh Government's consultation paper, but instead responds to questions which engage the Lord Chief Justice's interest in the rule of law, the independence of the judiciary, and the delivery of justice in Wales.



5. The Welsh Committee submitted a response to the inquiry conducted by the Constitutional and Legislative Affairs Committee of the Welsh Assembly into the establishment of a separate Welsh jurisdiction (hereafter, 'the Committee inquiry'). That response examined the practical implications of separating Welsh courts and court administration, the Welsh judiciary and Welsh systems of law, highlighting matters which require detailed analysis and careful consideration before any changes are decided upon. The points made are equally relevant to the Welsh Government's consultation. The Welsh Government is invited to read this paper in conjunction with the Welsh Committee's response to the Committee inquiry, appended to this paper.

6. The Welsh Committee has made known in that document the points important to it and which it is thought appropriate for a judicial body to make. It is not for lack of an intention to be helpful that the Committee does not propose to respond to the Government document question by question. Some of the questions have political connotations with which the Welsh Committee should not be involved. Some of them raise issues which are important when considering cross-border issues and how a separate jurisdiction might operate and liaise with other jurisdictions, for example questions 11 to 15 and 19. These are important questions and the difficulties involved should not be underestimated. However, provided political decisions and decisions on principle are taken, we are confident that constitutional lawyers could devise arrangements appropriate to the Welsh situation.
7. We accept that the practical effect of such cross-border issues is a factor to be considered when decisions about a separate jurisdiction are taken. There is also a possibility of increased litigation arising from issues of choice of forum and choice of law. The presence of a long common border with England, a much larger and more populous entity, cannot be avoided and neither can the proximity to that border of a large proportion of the population of Wales, in both north and south.
8. Questions 16 to 18 have political connotations. Questions 17 to 18 are also very general and speculation by the judiciary would not be helpful at this stage.



9. We do make further general comments which it is hoped will be helpful when the issues underlying the specific questions posed are considered. We do so by reference to the contents of the body of the consultation document. We do in particular invite attention to paragraphs 28 and 35 of the earlier response in which the Welsh Committee set out issues that in its view should be considered when decisions as to a separate jurisdiction are taken. Some of them anticipate questions now raised in the Government's consultation. We also invite attention to paragraph 16 of the earlier response which describes steps that could be taken, short of a separate jurisdiction, to mark the specific legal identity of Wales. Over a whole range of activities, political, economic, social and charitable there is a growing trend for Welsh based and Welsh organised activities.
10. We wish to repeat our primary concern, which applies both to present circumstances and to whatever further developments there may be, is for the rule of law and the independence of the judiciary which is an essential part of it. That requires not only judicial structures but supportive administrative structures within Government. It is expected that the Government will provide an environment in which the judiciary can operate independently and promote the sound administration of justice in the public interest.
11. We accept that, under present arrangements, there is scope for improved judicial structures in Wales to deal with issues and pressures arising from devolution and to ensure proper liaison between the judiciary and the National Assembly and Government. Such liaison must not of course impair the independence of the judiciary or the separation of powers as between legislative, executive and judicial branches of state.
12. We do not propose to theorise over what is meant by the term "legal jurisdiction". Wales is undoubtedly a geographical entity and has a population of about 3 million people within its borders. First, the relationship between executive and judicial arrangements for the administration of justice needs to be considered. Second, the separate though linked question, identified in the consultation document, of the relationship between legislative powers and power to enforce law also needs consideration.



13. ~~As highlighted by the First Minister, Wales is unusual in now having Welsh~~ based legislative and executive bodies but arrangements for the administration of justice are London based. The Minister of Justice in London continues to be the Minister of Justice for Wales with responsibility for the organisation of courts in Wales. Judicial appointments are the responsibility of the Judicial Appointments Commission in London, with limited ministerial involvement, though there is statutory provision for a Commissioner with special knowledge of Wales. Further comment on current arrangements was made at paragraphs 41 to 43 of the earlier response under the heading "Ministry of Justice". Under present arrangements, the need for some Ministerial responsibility based in Wales should, in our view, be considered.
14. A further transfer of responsibilities for the administration of justice to the Welsh government would have major consequences for the organisation of the judiciary sitting in Wales. It might be possible to have a single judiciary for England and Wales with separate Ministries of Justice. Conversely, it might be possible to have a separate Welsh judiciary working with an English based Ministry of Justice. Those possibilities have only to be stated, however, to highlight the anomalous situations that would arise. If the administration of justice were to be devolved, a correspondence of judicial and administrative responsibility for the same area and population would obviously have advantages.
15. On the second question based in paragraph 12 above, we offer a few general comments to provide a basis for discussion. Undoubtedly the law in Wales is becoming different from that in England in some areas, particularly public law. That is not, however, the case with important parts of the body of law, as recognised in the consultation document, criminal law (save in minor respects), consumer protection and employment law. While there is no inevitable link between the separation of laws and the separation of jurisdictions, increased difference in laws increases the rationale for separately appointed judges and separately organised courts. To the extent that the law may become different, in major respects it would become more difficult for the same judges to hear cases in both England and Wales. As the consultation



document recognises, decisions about devolution of the administration of justice would also be required from the United Kingdom Parliament.

16. Clearly the budgetary implications of a separate jurisdiction would need to be considered. That would involve consideration of whether extra costs will be involved and from whose budget any additional requirement should come. Consideration would also need to be given to the issue of responsibility, as between the Welsh Government and the Judiciary, for control and allocation of the justice budget.
17. As the consultation paper demonstrates, by reference to the administration of criminal law in Canada, a separate court system may exist to deal with cases not within the competence of that jurisdiction's government and legislature. The devolution of criminal justice would clearly be a major step, whether or not accompanied by the devolution of legislative powers. If it is to be considered, it should in our view be considered along with devolution of responsibility for the police service and would also almost inevitably require the establishment of a separate criminal justice system infrastructure, including prosecution, prison and probation services, as discussed in paragraph 35 of the earlier response. If the power to make criminal law remained with the UK Parliament but its administration was devolved, tensions could develop, for example, on issues of sentencing policy and treatment of offenders, where the devolved administration might expect to make different arrangements.
18. Subject to statutory interventions, commercial law could remain common between England and Wales. Plainly confidence in commercial law and in its administration is essential to economic success and prosperity in Wales. The Welsh Government encourage inward investment, and legal arrangements in Wales should obviously be such as to encourage rather than discourage it. The issue was raised in paragraph 28(e) of the earlier response. We are not aware of any discouragement to investment in Scotland or Northern Ireland arising from there being separate jurisdictions there but there may be research, pointing one way or the other, of which we are unaware.



19. ~~Consideration would need to be given to the administration of other specialist~~ areas of law, for example, charities law which is at present common to England and Wales. They require the availability of specialist legal advice and specialist court determinations. The charities judiciary are submitting a paper.

20. We have mentioned the separate jurisdictions in Scotland and Northern Ireland and further information as to their operation, which we cannot at present provide in any detail, would be helpful to the Government. Both jurisdictions are, for most practical purposes, independent of that in England and Wales. They differ from each other in that Scotland has a quite separate legal tradition from that in England and Wales but Northern Ireland shares a common law tradition with England and Wales. The population of Wales is of course substantially larger than that of Northern Ireland. Its jurisdiction was created in 1920 not out of the jurisdiction of England and Wales but out of the former jurisdiction for all Ireland. While sharing with England and Wales a common law tradition, the Irish jurisdiction had been quite separate, with separate administration and a separate judiciary, so that the starting point was different from the present position in Wales. There are also obvious geographical differences too. Both those jurisdictions are more remote from England than is Wales, the bulk of the Scottish population being well separated from England and Northern Ireland being separated by sea.

21. We would see no difficulty, if a separate jurisdiction were established, for Wales to remain a common law jurisdiction, as has Northern Ireland and, for an even longer period, other Commonwealth countries. The common law would continue to develop as it always has though there may be statutory interventions in Wales, as there are now in England and Wales, and elsewhere. Commonwealth cases and decisions of Northern Ireland courts are cited in England and Wales, particularly in the higher courts. The common law might develop differently in Wales because of perceived different needs. The Supreme Court of the United Kingdom could remain as the highest court, as it is for Northern Ireland, subject to European Courts where appropriate. The earlier response also drew attention, at paragraph 35(d) to the need for scrutiny



systems to ensure compliance with EU law to avoid conflicts with the United Kingdom's international obligations and to limit litigation under section 94(6)(c) of the Government of Wales Act 2006 (or any succeeding provision).

22. The Welsh Government note in the consultation document that a body of law exists which governs the choice of jurisdiction and the choice of law as between the different legal jurisdictions of the United Kingdom. The European context is important. At present, the Civil Jurisdiction and Judgments Act 1982, which has UK-wide application, has effect for determining jurisdiction as between each part of the United Kingdom for matters within the scope of the Brussels I Regulation, which does not itself provide a jurisdictional scheme of application within the UK. Once jurisdiction is determined, the Rome I and Rome II Regulations apply to resolve choice of law between the 'territorial units' of the United Kingdom with respect to conflicts within their respective scope, by provisions which are optional in this context. Domestic statutory law (most notably the Private International Law (Miscellaneous Provisions) Act 1995), and the common law governing conflict of laws, are increasingly residual in this context.
23. A Welsh Committee of the Judicial College has already been established and the need for judicial training to meet the distinctive requirements of Wales has been recognised. It is important that the Committee be adequately funded. At present, this is a particular need for the Tribunals judiciary and we welcome the separate paper they have submitted and in particular the requirements identified. For the entire judiciary, Welsh language needs and specialist training in the use of the Welsh language in court is necessary. Increased bilingualism would need to be supported by training, and adequate resources provided.
24. The Government are right in our view to consider the impact of a separate legal jurisdiction on the legal professions. There is at present complete cross-border freedom of movement for the professions as between England and Wales. The availability of legal services from well qualified and motivated legal professions is a vital component of a legal system. It is important that the legal professions make known their views. There would be likely to be



~~strong pressures for continuing cross-border rights of audience. At present all~~
three branches, barristers, solicitors and legal executives, have Welsh entities, that of the Bar being of very long standing, but the legal professions are essentially organised and regulated from London. Consideration would need to be given to whether specifically Welsh qualification and organisation would be required and the views of the profession are vital in deciding that.

25. The Welsh judiciary would do all they could, as they now do, to support the legal professions in Wales and to encourage them to meet growing needs arising out of devolution, particularly in public law. From a judicial perspective, the judiciary, in a separate jurisdiction, would require such powers in relation to the discipline of the professions in court as is necessary for the proper administration of justice. The good and constructive relationship between the Bench and advocates is a valuable feature of the present system and that should not be allowed to be damaged.
26. The judiciary fully share the concern the Government has expressed about the need for ready access to the law applicable in Wales. We are aware of some of the work being done in this area and fully support and welcome it.

Welsh Government

Consultation on a Separate legal Jurisdiction for Wales

Response
by
The Hon Mr Justice Roderick Evans

Roderick Evans practised as a barrister in Swansea from 1970 to 1992 and was appointed Queen's Counsel in 1989. In 1992 he was appointed a Circuit Judge and, thereafter, was Resident Judge at Merthyr Tydfil Crown Court (1994-98), Swansea Crown Court (1998-99) and Senior Circuit Judge and Honorary Recorder of Cardiff (1999-2001).

Since 2001 he has been a High Court Judge. From 2004 to the end of 2007 he was a Presiding Judge initially of what was the Wales and Chester Circuit and after April 2007 of Wales.

June 2012

Response to the Welsh Government's Consultation on
A Separate Legal Jurisdiction for Wales

1. Comment on the Consultation document

- 1.1 The questions posed in the Consultation Document are capable of providing endless discussion – academic, political and within the legal profession. Some, such as the multi-choice questions, are simply too academic while others either import unnecessary complications into what is fundamentally a political and practical issue or give the impression that issues arising from the possible creation of a Welsh jurisdiction have never previously been considered.
- 1.2 I do not intend to analyse each question in the light of the above comments but examples might suffice to illustrate the point made.
- 1.3 Arrangements for the cross-jurisdictional enforcing of court orders, warrants and judgments exist already not only in relation to the jurisdictions of the United Kingdom but also in relation to many jurisdictions in the world. Such arrangements suitable for whatever jurisdictional structures which might exist in Wales could be made without difficulty. Similarly, issues arising from the existence of the Common Law have already been addressed not only in Northern Ireland but also in many countries in the Commonwealth. It is commonplace for judicial decisions from other Common Law jurisdictions to be quoted in the courts of England and Wales. Considerations relating to the existence and/or development of the Common law have little if any relevance to the question of whether or not Wales should have its own legal jurisdiction.
- 1.4 Whether a Welsh legal jurisdiction should be created is a political decision which, in the first place at least, is for the Welsh Government to make. Among the considerations which should inform that decision are the following:
 - (a) what jurisdictional structures are necessary to best support the further progress of devolution

- (b) what kind of civic society does the Welsh Government want to develop in Wales
 - (c) what arrangements – jurisdictional or otherwise - need to be put in place in Wales to ensure:
 - (i) the best provision of legal services to the people of Wales
 - (ii) the development in Wales of a system for the administration of justice which is best suited to the demographic, geographic and linguistic needs of Wales
 - (iii) that the economic benefits which a developed system for the administration of justice creates are made available to the people of Wales
- 1.5 Once that decision is made, its implementation would be a matter of negotiation between the Welsh and the United Kingdom Governments. There is no legal issue arising from domestic or inter-jurisdictional law which would prevent the implementation of the decision and there are numerous other jurisdictional arrangements within and without the United Kingdom which could provide a useful comparison for the arrangements suitable for Wales.

2. Separate Jurisdiction

- 2.1 One might expect that a “separate jurisdiction” requires a defined territory, a law making body within that territory empowered to make laws for that territory and a judicial system within that territory to administer those laws. However, the United Kingdom encompasses a number of “separate jurisdictions” none of which falls neatly within that pattern. These jurisdictions have developed for historical or political reasons and have been tailor made to meet the requirements of a particular situation. None is exclusive or watertight in the sense that there is no input from outside the territory into the workings of the jurisdiction.
- 2.2 Scotland retained its separate jurisdiction after the union with England. It had a defined territory and a judicial system largely separate from that of England but all its laws were made by the Westminster Parliament. Even now, following the creation of the Scottish Parliament, when much Scottish law is made in Edinburgh, there remain significant crossovers between the

Scottish and England and Wales jurisdictions. For example, laws applicable to Scotland in fields reserved to the UK government continue to be made in Westminster and there are elements of the tribunal judicial system which applies to Scotland which are organised on a United Kingdom or Great Britain basis.

2.3 The jurisdiction of Northern Ireland was created for political reasons in the 1920s. It has a defined territory, a separate judicial system and a devolved legislature which creates laws applicable only to that territory. However, there are cross-overs between the Northern Ireland jurisdiction and other jurisdictions and the jurisdiction of Northern Ireland continued even during periods of direct rule from Westminster. Part of the Northern Irish tribunal judicial structure, like that of Scotland, is organised on a UK or Great Britain basis and the UK parliament legislates on reserved matters.

2.4 Following the Good Friday Agreement, criminal law was a reserved matter and it continued to be so until 2010. In a speech delivered on 16th October 2008, the then Prime Minister Gordon Brown sought to encourage the Northern Irish Assembly to seize the opportunities which the devolution arrangements in Northern Ireland offered. He said:

“.....there is something more vital at stake for your entire society that only the completion of devolution can deliver. How can you, as an Assembly, address common criminality, low-level crime and youth disorder when you are responsible for only some of the levers for change; when you have responsibility for education and health and social development but have to rely on Westminster for policing and justice?”

The people of Northern Ireland look to you to deal with these matters because to them they are important. Full devolution is the way to deliver better services, tailored to the needs of all communities, regardless of the politics. It is the best way for you to serve them.”

2.5 Wales, on the other hand, although it has a defined territory and a legislature which can create laws on certain devolved matters

does not have its own jurisdiction. In broad terms, the administration of justice in Wales is not devolved and the judicial system which operates in Wales is part of the judicial system of England and Wales. I say “in broad terms” as aspects of the tribunal judicial system which operates in Wales, like those of Scotland and Northern Ireland are organised on a UK or Great Britain basis. Of potentially more significance, however, is the fact that some aspects of the administration of justice are devolved. The National Assembly/Welsh Government is responsible for over a dozen tribunals and has the power to create further tribunals. Although appeals from these tribunals feed into the wider England and Wales appellate structures, the Assembly’s responsibility for these tribunals and its ability to pass primary legislation enable one to say that Wales already has an embryonic jurisdiction which will develop as the Assembly acquires more powers, creates more laws which are different from those which apply in England and establishes more tribunals.

- 2.6 While each of these jurisdictions has features fundamentally different from the others each has an appeal route to the Supreme Court and each has to have regard to the jurisprudence of Europe.
- 2.7 Jurisdictions, therefore, come in a variety of forms even within the UK and can be created to fit the particular requirements of a state or devolved administration and can be amended as circumstances change.

3 Wales’s position in the jurisdiction of England and Wales

- 3.1 The present jurisdiction is wholly London-centric. All its institutions are based in London and Wales is treated for practical purposes just as another circuit of England. There are a number of adverse professional, social and economic consequences to this amongst which are the following:
- (i) The system has inhibited the development of expertise in certain specialised areas of practice. For example, the fact that, until comparatively recently, all Judicial Review cases were heard in London meant that few practitioners in Wales developed or had the scope to develop a practice in that field. However, the opening of the Administrative Court in Cardiff and the

- possibility of doing this work in Wales has caused some practitioners to develop the necessary knowledge and expertise.
- (ii) There is no body in Wales which has responsibility for making decisions on the siting, designing and financing of court building in Wales. The infrastructure of the administration of justice has never been developed on a whole Wales basis. The result is that we have courts along the North Wales coastal strip and courts along the Southern coastal strip but inadequate provision between the two. Between Swansea and Caernarfon there is no Crown Court (save for Carmarthen Crown Court which because of its inadequate facilities can be used only for restricted categories of work) and between Merthyr Tydfil and Mold there is no Crown Court at all.
 - (iii) Many jobs and career structures relating to the administration of justice in Wales are based in London.
 - (iv) Because of the unified England and Wales jurisdiction individuals who have no knowledge of or connection with Wales can be appointed to the judiciary in Wales or to judicial posts which have responsibility for or influence over Wales.
 - (v) Sittings of the High Court and Court of Appeal in places outside London – including Wales – are limited by the demands of London for judicial time.
 - (vi) The unified jurisdiction does not adequately recognise the developing constitutional position of Wales and attempts to obtain appropriate recognition for Wales have to be made on an *ad hoc* basis and are met with resistance.
 - (vii) Although in recent years attitudes towards the use of the Welsh language in the administration of justice have changed for the better we still have, forty-five years after the passing of the first Welsh Language Act, a system which is fundamentally English and which accommodates the Welsh language when it has to. Welsh and those who wish to use it remain in an inferior legal position.

3.2 These disadvantages and others similar to them could be remedied without the creation of a separate Welsh jurisdiction if the present jurisdiction were to provide Wales with the necessary structures and resources to ensure the development of Wales's emerging legal personality and to enable the judicial structures in Wales to properly support the constitutional changes which have taken place and those which are likely to occur. However, experience so far makes me question whether such provision will be made.

4. The need for a Welsh Jurisdiction

4.1 Whether a Welsh jurisdiction should or should not be created is a political decision which will be made for reasons wider than the present or anticipated differences between English and Welsh law. It is inappropriate for a serving judge to express an opinion on such a political matter. The judiciary will make work and will work within whatever jurisdictional structure democratically elected politicians put in place and will expect the independence of the judiciary to be respected and protected within that structure.

4.2 The divergence between the law in England and the law in Wales brought about by devolution is significant but not great. At present that divergence may not at first sight require the setting up of a jurisdiction but the divergence will increase now that the Assembly has acquired the powers contained in Part IV of the 2006 Act and will further increase as the Assembly acquires more responsibilities and legislative competence.

4.3 One of the reasons frequently advanced for the distinction drawn between the nature of the devolution settlements in Scotland and Northern Ireland (reserved powers models) and that in Wales (a transferred powers model) is that the former model is inappropriate for Wales as Wales does not have its own jurisdiction i.e. it does not have the necessary judicial structures to support such a devolutionary settlement. It follows from that argument that if Wales moves to a reserved powers model or intends to do so or gains a breadth of legislative competence which, for example, includes part of the justice system, a Welsh jurisdiction would be necessary.

4.4 There has to be a strong element of forward planning. The creation of a jurisdiction will take time as there are essential elements of a jurisdiction which do not presently exist in Wales. Therefore, waiting until the degree of divergence has reached a critical stage before deciding to create one would result in a period of uncertainty and dysfunctionality.

5. The Elements of a Jurisdiction

5.1 Some elements necessary to establish a Welsh jurisdiction already exist in Wales; others are absent and would need to be created. As far as the courts and courts judiciary are concerned structures relating to all courts up to and including the Circuit Bench are in place. However, no structures relating to the High Court and Court of Appeal exist in Wales and if a Welsh jurisdiction were to have its own High Court and Court of Appeal offices for these courts would need to be established.

5.2 The consultation paper poses questions about the need for a separate court system for Wales and a Welsh judiciary in the event of a Welsh jurisdiction being established. The answer to these and similar questions depends upon answers to questions similar to those set out in para 1.4 above. What would be the advantage to Wales in having a Welsh jurisdiction but decisions about the location, financing, and running of the courts in Wales being made in London? Similarly, in respect of the judiciary: what would be the advantage to Wales of sharing a judiciary with England and having deployed to Wales – on either a permanent or visiting basis - judges who have no knowledge of or understanding of Wales and, in the case of the High Court, only when London is able to release them from duties in London?

5.3 As to sharing courts with England, there can be no objection to sharing the Supreme Court as the ultimate appellate court of the United Kingdom if provision is made for Welsh membership of the court. Furthermore, a respectable argument can be made for sharing a Court of Appeal with England at least in the early years of a Welsh jurisdiction (see the appellate arrangements in place in the early years of the jurisdiction of Northern Ireland). Again appropriate provision would have to be made for Welsh membership, strict protocols put in place to ensure that the Court of Appeal sat in Wales to hear Welsh appeals and an

office established in Wales to ensure that all administrative functions and economic benefits related to Welsh appeals inure to the advantage of Wales.

5.4 However, it would be essential for Wales to have its own High Court. To share a High Court with England would have no benefits for Wales and many disadvantages. It would perpetuate the present system of Wales being treated as a circuit of England for the deployment of High Court judges and Wales having to engage in an unequal struggle against the demands of London for High Court judge time. There would also be practical difficulties. Some Circuit judges are authorised to do High Court work (Section 9 judges). In which jurisdiction would such a judge be sitting doing such work? Who would be responsible for his appointment, deployment and salary? Such an arrangement would be an unnecessary complication in what should be a structure easily understood by the public. If there is to be a Welsh jurisdiction it should follow that all first instance decisions (at least) should be made within that jurisdiction.

5.5 In addition, there is a range of bodies and functions which would need to be considered in the formation of a Welsh jurisdiction. They include the equivalent of a Judicial Appointments Commission, judicial disciplinary procedures, an Offender Management/Probation Service, a Prison Service, a police service answerable to a Welsh Government Minister, a prosecution service together with procedures for reciprocal enforcement of warrants, judgements, etc.

6. The implications of a separate jurisdiction for the Legal Profession

6.1 If Wales and England were to have separate jurisdictions each would be a Common Law jurisdiction and the fundamental concepts of the law would be similar. There is no reason why Welsh lawyers should not continue to be able to practice in England and to have rights of audience in English courts or why English lawyers should not be in the same position in Wales.



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Response to the Welsh Government Consultation on a Separate Legal Jurisdiction for Wales¹

1. Do you agree that a defined geographical territory would be an essential feature for a separate Welsh legal jurisdiction?

Yes.

- 1.1 What, for the purposes of a separate Welsh legal jurisdiction, might that territory be – “Wales” as defined in the Interpretation Act 1978 or as defined in the Government of Wales Act 2006?

We have no strong views on this point, but note that the definition in the Government of Wales Act 2006 is wider than in the Interpretation Act 1978, which may make the 2006 Act definition more appropriate.

2. To what extent (if any) is a distinct body of law an essential feature for a separate legal jurisdiction?

Based on our research into Northern Ireland, there seems to be a consensus that it is a separate court system that represents the main feature of a separate jurisdiction. Whilst it is probable that a separate jurisdiction will have a body of law that is distinct in some respects (as in Northern Ireland), this is not an essential feature. To provide an admittedly simplistic analogy, if the laws of England and Wales happened to be the same in some respects as the laws of France, it would not follow that England and Wales and France could be considered a unified jurisdiction.

- 2.1 When is a body of law distinct enough in this regard?

¹ Please note that, as explained in our covering letter, this response is based on the preliminary findings of a funded research project that we are currently undertaking which examines the experiences of Northern Ireland as a small legal jurisdiction.

Due to our answer to the question above, we do not think that this is applicable. In Northern Ireland many areas of the law are very similar to England and Wales, and there are moves underway to make some areas more similar (such as the law of evidence). It does not logically follow that there is not a separate jurisdiction.

2.2 Does it matter whether the law in question is statute law or common law?

No.

2.3 Does it matter what the nature of the subject-matter of the law is – e.g. criminal, civil, family?

No.

3. To what extent (if any) is the separation of responsibilities (i.e. Wales from England) for the administration of justice an essential feature of a separate legal jurisdiction?

This is a crucial feature. Without a separate legal system, by which we would include separate courts, there cannot be a separate jurisdiction.

3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?

It would not be compatible.

3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?

It would not be compatible.

3.3 If there were a separate Welsh courts system, which courts would be affected?

All courts below the Supreme Court, as is the case in Scotland and Northern Ireland.

3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?

Yes.

3.5 Should Wales continue to share some courts with England, and if so, which ones?

The Supreme Court should be shared, as in Scotland and Northern Ireland. It may also be appropriate to share some tribunals, such as the Asylum and Immigration Tribunal.

Consideration may also be given to sharing some of the specialist commercial courts dealing with matters such as construction, technology and intellectual property.

- 3.6 If Wales and England continued to share some courts, what (if any) changes might be needed in the organisation of those courts?**

Not applicable.

- 4. To what extent (if at all) would it be necessary for the devolved legislature to have general legislative competence over the criminal law as a separate devolved subject if responsibility for the administration of justice was devolved?**

It would not be necessary – the two issues are not interlinked. Devolving criminal law is a devolution issue, not a jurisdiction issue.

- 4.1 Are there any other subjects of legislative competence that should be devolved in such a case?**

No, for the same reasons already set out above.

- 5. How might a unified England and Wales court system work if:**

- 5.1 There were a separate Welsh legal jurisdiction and the Assembly's legislative competence:**

- a. remained, as now, with the ability to expand incrementally, or

As we have already stated, there cannot be a separate Welsh jurisdiction with a unified court system.

- b. extended over all matters except for those expressly reserved to the UK Parliament?

See above.

- 5.2 The current unified legal jurisdiction of England and Wales continued and the Assembly's legislative competence:**

- a. remained, as now, with the ability to expand incrementally, or

See above.

- b extended over all matters except for those expressly reserved to the UK Parliament?

See above.

6. When reference is made to a 'legal jurisdiction' in the sense of England and Wales being a legal jurisdiction separate from, for example, Scotland what, in its simplest form, does that mean?

Based on our Northern Ireland research we would suggest that to have a separate legal jurisdiction there must be a distinct territory and a separate legal system. There does not necessarily need to be a separate legislature, nor is a separate body of law a determinative factor.

- 6.1 In this context does legal jurisdiction just mean the territory over which the legislature (or executive) has power to legislate?

No. The concepts of territorial legislative competence and the territory of a legal jurisdiction are not synonymous as a legislature is not required under our definition of a jurisdiction as set out above (note also our answer to question 19 which allows a broader effect for some legislative provisions than the territorial limits). The main difference is in the territorial jurisdiction of the courts.

7. Are there any other essential features of a separate legal jurisdiction?

No.

8. Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest of the UK?

An increasing divergence in the law (caused by legislation passed both in Cardiff and Westminster) would lend weight to the case for establishing a separate legal system.

9. If you consider that the current legal jurisdiction is sustainable then are there any short-term or long-term changes that should be made to any of the following?

- a. The administration of the courts and/or tribunals systems

There may be a need for more Practice Directions relating to Wales.

- b. The judiciary (including the magistracy)

There is a need to ensure that there are judges who have appropriate expertise in Welsh legal matters.

c. The legal professions (including their regulation)

There should be a requirement for members of the legal profession whose work covers Welsh law to have appropriate training on Welsh legal matters.

d. Education and training in law

In undergraduate legal education, it is important that courses/modules allude to the existence of Welsh law and how it is made, and outline the substantive divergences where relevant. The Joint Academic Stage Board should make this a requirement for qualifying law degrees in both England and Wales.

There is a need for textbooks and other relevant resources relating to Welsh laws. In particular, there is a need for further Welsh language resources, as well as research relating to Welsh legal developments. In this sense, one particularly worrying finding from our research in Northern Ireland was that academics were under the strong impression that research relating to distinct Northern Ireland laws would not be viewed favourably for REF exercise purposes. The effect of this is that academics are dissuaded from writing on important subjects such as Northern Ireland land law, which is very different to land law in England and Wales. Other interviewees viewed this situation as highly detrimental. In Wales, we have come across similar perceptions, and it is vital that appropriate steps are taken to address the issue.

For professional continuing education, CPD training relating to Welsh law is needed. This would be a suitable role for a Welsh equivalent to the Serving the Legal Service Programme in Northern Ireland (see below).

e. Accessibility of legislation

When discussing accessibility a distinction should be made when referring to a service that provides access to updated Welsh legislation and, separately, a service that provides summaries and commentary for Welsh laws. It is the latter that we consider to be of most importance at this current time .

Something similar to the Serving the Legal Service Programme (SLS) in Northern Ireland is urgently needed in Wales. This stems from the implications of having devolved law making powers, and applies irrespective of whether there is a unified or separate jurisdiction (though clearly a separate jurisdiction would impact upon its role).

The SLS, which is a charitable organisation, produces a bulletin ten times a year, practitioner/academic books, online resources, and arranges a wide range of specialist CPD training. A Welsh equivalent should do the same.

Crucially, it should not be based on the model of the old Wales Legislation Online (WLOL) system, which was too limited. Our research in Northern Ireland showed that

one of the most valuable aspects of the SLS service was the summaries and commentary on the law. THE WLOL system did not provide this.

- 10. If you consider that the current legal jurisdiction is sustainable then are there any other short-term or long-term changes that should be made?**

We take the view that a separate Law Commission for Wales is needed. This would enable a specific focus on effectively utilising the law-making powers of the Assembly. In Northern Ireland, there is a view that it is devolution and separate law-making powers that provides the rationale for having a separate Law Commission, as opposed to having a separate jurisdiction. The model of the Northern Ireland Law Commission, though currently under review, could provide useful guidance as to how a Welsh Law Commission could function.

- 11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognised as a law in other jurisdictions within the UK?**

Yes, our understanding that the laws of all jurisdictions tend to be recognised as being laws in other jurisdictions, but will clearly not be applied.

- 12. Would such statute law be judicially noticed in those other jurisdictions?**

Yes, in the same way as a judge in England and Wales may wish to notice and comment on a statute in another jurisdiction as part of his or her deliberations. Again however, it would not be applied.

- 13. Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions – e.g. for enforcement or through judicial review?**

No. Proceedings in England under Welsh law would be transferred to Wales.

- 14. Would such statute law be capable of being the subject of criminal proceedings in those other jurisdictions – e.g. arrest, charge, prosecution, conviction and sentencing?**

This would be a matter of cross-jurisdictional enforcement.

- 15. What are the potential implications of a separate Welsh legal jurisdiction in terms of private international law (or “conflict of laws”) between Wales and the rest of the UK?**

We do not have sufficient expertise on private international law issues to answer this question.

16. In the event that Wales moved towards a 'reserved powers' form of devolution, like Scotland's, do you think a separate Welsh legal jurisdiction would be:

- a. essential;
- b. desirable;
- c. undesirable; or
- d. irrelevant?

We do not consider that this would have an impact.

17. Would the shared England and Wales jurisdiction be sustainable if Welsh devolution were widened?

See our answer to question 8, above.

18. If it would be sustainable, which areas of law would need to be reserved to the UK Parliament?

This is not relevant to the issue of a jurisdiction. Some areas of law are reserved for practical and political reasons, such as defence, immigration and various other matters such as the postal service.

19. Would the emergence of a separate Welsh legal jurisdiction require the removal of the Assembly's power that enables it in certain circumstances to make laws applying in England?

It is suggested that a certain amount of flexibility and openness is required between the proposed separate English and Welsh jurisdictions to reflect their inevitable interaction and proximity. For this purpose allowing the Assembly to retain some powers of enforcement and effectiveness, as defined under section 108(5) of the 2006 Act, could be beneficial as a potential cross-jurisdictional mechanism. Therefore, its current constitutional effect could be adapted for cross-jurisdictional purposes such as to resolve the example used in the consultation document. This could provide a workable solution for future cross-jurisdictional issues.

As a result, the territorial effect of an Assembly Act does not have to be rigorously limited to the territorial limits of the jurisdiction.

19.1 Would there be any legal, constitutional or practical difficulty in the Assembly retaining such a power?

- a. upon the basis that any provision made in relation to England would extend to and from part of the law of England?

In effect, this is a continuation of the current constitutional and legislative provisions and there should be no significant constitutional problems beyond the current situation.

Consideration could be given to the requirements regarding consultation and agreement with relevant authorities and English Ministers when such powers are proposed but presumably these are required regardless of whether a jurisdiction exists or not.

b. Otherwise, and if so how?

The key jurisdictional difference is in deciding which court has jurisdiction to determine such cross-jurisdictional issues. This should be clearly noted and agreed as part of any relevant legislation making use of section 108(5). It is suggested that if it relates to Welsh legislation then the relevant authority would be the Welsh courts.

19.2 If you think that there would be such difficulties:

a. what are they?

See above.

b. would those difficulties be any different to the current situation where the Assembly already has the power to make provision applicable in England?

See above.

20. To what extent (if any) is the concept of a separate Welsh legal jurisdiction compatible with the unified England and Wales legal professions?

It would not be compatible. A separate Welsh legal profession would be needed.

20.1 What are the potential effects (if any) of a separate Welsh legal jurisdiction on the following aspects of the legal professions?

a. education and training;

At undergraduate level, thought would need to be given as to the requirements of a qualifying law degree (QLD) in Wales and in England. No doubt Welsh Universities would need to teach the substantive English law (as happens in Northern Ireland with land law for example), but as in Northern Ireland it is unlikely that this would happen the other way round, which would be regrettable.

b. qualification;

In Northern Ireland, the pathways to qualification are very different. It may be worthwhile to consider whether something similar would be desirable in Wales, such as

insisting on studying a substantial number of modules to reflect the diversity of small firm practice.

Another consideration is whether a QLD in England (or another jurisdiction such as Northern Ireland) would permit access onto a postgraduate professional training course – would a student need to take any further exams for example?

More generally, there may be an opportunity to consider whether the pathways for qualification could be reformed. In Northern Ireland for example there is a requirement for students to have a practitioner 'Master' prior to embarking on the course. In addition, there are no alternative pathways such as ILEX. We have no views as to whether or not the system in Northern Ireland is better than that in England and Wales, and came across a range of opinions in this respect.

Cross-border practice would also be an issue. This is particularly relevant given the geographical nature of Wales. There are requirements on Northern Ireland solicitors who wish to practice in England and Wales which have been imposed by the professional bodies in England (though currently there are no such requirements in the reverse situation). It would be necessary to consider whether conditions could or should be imposed on solicitors who have qualified in Wales and wish to practice in England and vice versa.

c. regulation.

The regulation system would need to be changed. It could be based on the current model in England and Wales, or the Northern Ireland model, where there is no equivalent to the SRA and BSB.

21. Would the common law that has evolved as part of the unified jurisdiction of England and Wales be affected by the creation of a separate Welsh legal jurisdiction?

This has generally not occurred in Northern Ireland. England and Wales cases have strong persuasive force. Furthermore, due to the continued role of the Supreme Court, the principles which would be applied would be exactly the same.

22. Would your answer be different if there was a separate court system in Wales?

Not applicable – without a separate court system there would not be a separate Welsh legal jurisdiction.

23. Would your answer be different if the Assembly had legislative competence generally over:

a. criminal law;

No, even if laws are slightly different, the principles of common law are the same. It is unlikely that there would be significant divergence within the criminal law in any event, even with legislative competence. It is likely that peripheral matters, such as youth justice, would be more likely to be affected. Indeed, in Northern Ireland, there are moves to bring areas of the criminal law, such as the law of evidence, in line with the law of England and Wales.

b. civil law; or

As above.

c. any other area of law?

As above.

24. Could there need to be express reservations excluding the common (judge-made) law from the legislative competence of the Assembly?

This does not currently happen and we cannot see how it would be either necessary or desirable.

24.1 Why would that be desirable, and how would it work in practice?

Not applicable.

24.2 How difficult would that be?

Not applicable.

25. Are there any wider economic (including resources), legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?

Although we are not in a position to comment on the economic implications of having a separate legal system some of our interviewees in Northern Ireland suggested that there may be implications. Further research is needed in this respect.

There may be a need to be a separate legal aid fund for Wales. This would have implications in terms of access to justice, and would have implications for the legal profession in Wales.

There may be the possibility of forum shopping dependent on legal divergences.

In terms of linguistic ramifications, although this issue did not arise in our Northern Ireland research we would note that the creation of a separate Welsh legal jurisdiction may greatly facilitate those using the Welsh language in the courts, because Welsh cases

would as of right be held in Wales with the effect that the provisions set out under section 22 of the Welsh Language Act 1993 would apply.

26. **Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?**

Yes, an equivalent to the SLS in Northern Ireland is needed. See above.

27. **In a specifically Welsh context, are there any additional features that would be appropriate for a separate legal jurisdiction to operate effectively?**

A separate Law Commission for Wales is needed (this is irrespective of whether there is a separate jurisdiction).

A Judicial Appointments Commission would also be needed.

28. **Would your answers to any of the questions in this consultation paper be different if the approach to the Assembly's legislative competence was the same as that of the Scottish Parliament – i.e. if the Assembly had competence over all matters except those expressly reserved to the UK Parliament?**

No.

29. **We have asked a number of specific questions. If you have any related issues which we have not specifically addressed please tell us about them.**

We will be preparing a detailed report setting out the findings from our Northern Ireland research in due course, and will make it available to the Welsh Government.

**Dr Osian Rees
Dr Alison Mawhinney
Ms Sarah Nason
Mr Huw Pritchard**

June 2012